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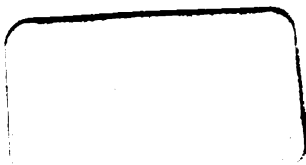
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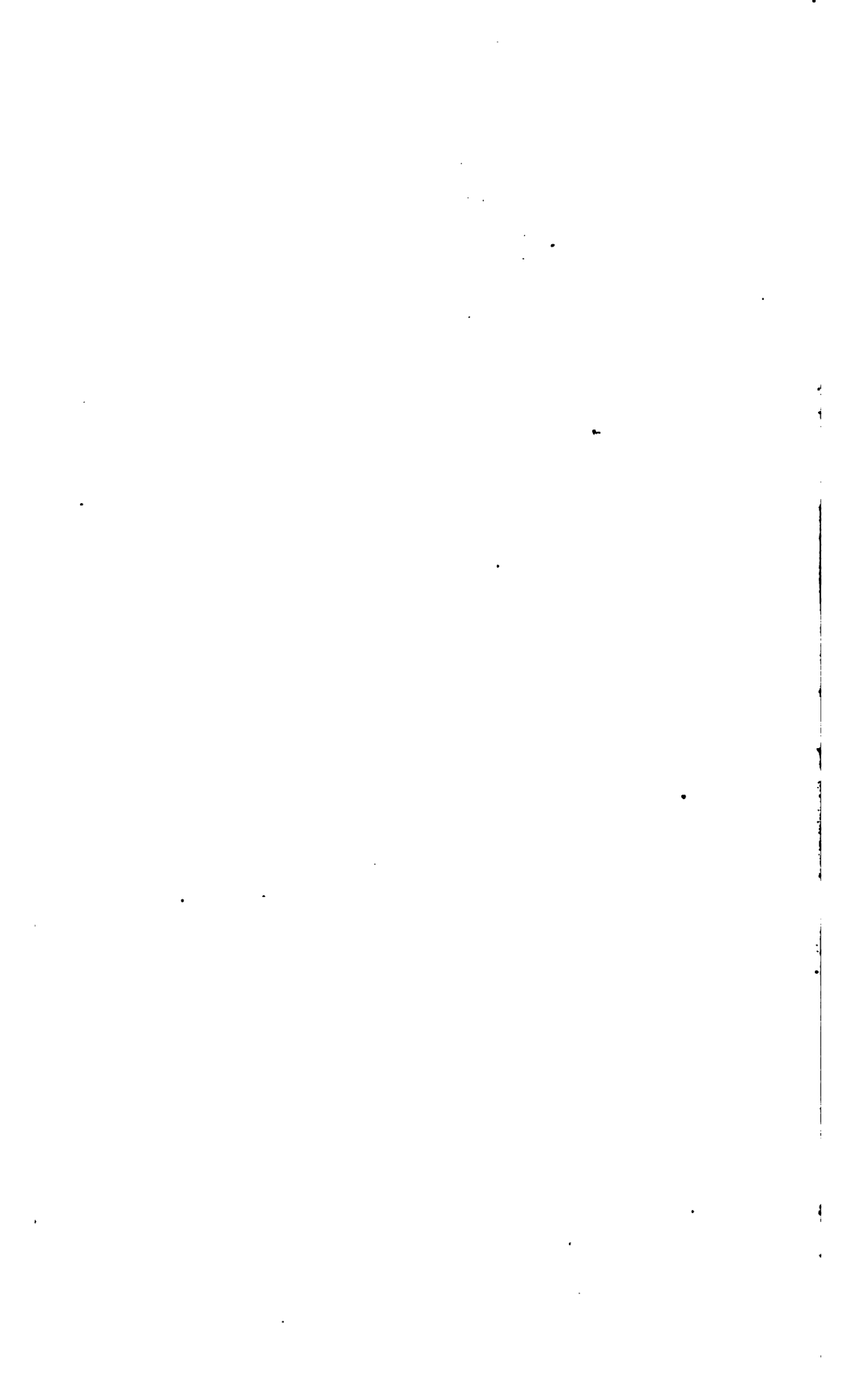


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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

(SECOND DIVISION)

FROM AND INCLUDING DECISIONS OF FEBRUARY 12, TO
DECISIONS OF MAY 31, 1892,

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOLUME CXXXII.

ALBANY:
JAMES B. LYON.
1892.

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IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
(SECOND DIVISION)

COMMENCING FEBRUARY 12, 1892.

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JULIUS N. KALLEY et al., Respondents, v. FREDERICK BAKER,
Appellant.

When, through the procurement of a broker employed to effect an exchange of real estate, a contract for the exchange has been agreed upon and entered into between his customer and the person with whom the exchange was to be effected, in the absence of any express agreement to the contrary the broker is entitled to his commissions.

It is no defense, therefore, to an action by the broker to recover his commissions, that the title of the other party to the contract, to the real estate agreed to be exchanged by him, is defective, and so that he is unable to perform his contract.

(Argued January 25, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made February 24, 1890, which affirmed a judgment in favor of plaintiffs, entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Albert Allan Abbott for appellant. Plaintiff's right to compensation depended upon the performance of the under-
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taking. (*Sibbald v. B. I. Co.*, 83 N. Y. 378; *McGavock v. Woodlief*, 20 How. [U. S.] 221; *Duclos v. Cunningham*, 102 N. Y. 678; *Fraser v. Wyckoff*, 63 id. 445; *Barnes v. Roberts*, 5 Bosw. 73.) The party-wall agreement and the Pierrepont agreement were encumbrances which made it impossible for the Humphery party to perform the contract on their part. (*Wetmore v. Bruce*, 22 J. & S. 149; *Trustees v. Lynch*, 70 N. Y. 440; *Peters v. Deleplaine*, 49 id. 362; *Gilbert v. Peteler*, 38 id. 165; *Raynor v. Lyon*, 46 Hun, 227; *Burwell v. Jackson*, 9 N. Y. 539.) The defendant was under no obligation to inform either the plaintiffs or Henry C. Humphery, or his assignee, Kearney or Ann O. Humphery, of the encumbrances existing by reason of the party-wall and Pierrepont agreements, nor to specify these as objections to the title. If he failed in this he waived nothing. (*Johnson v. Oppenheim*, 55 N. Y. 280; *Newbury v. Furnwal*, 56 id. 638.)

Wm. J. Gaynor for respondents. The pleadings presented no issue of fact, except as to the amount of compensation which the plaintiffs were entitled to. (*Duclos v. Cunningham*, 102 N. Y. 678; *Sibbald v. B. I. Co.*, 83 id. 378.)

FOLLETT, Ch. J. This action was begun to recover commissions alleged to have been earned by the plaintiffs in procuring the execution of a contract between the defendant and one Humphery, for the exchange of real estate.

In 1889, and for some years prior thereto, the defendant owned a farm in the state of Massachusetts, and Ann O. Humphery an apartment-house on the north side of Remsen street, in the city of Brooklyn, known as the "Aldine," in which there was certain personal property.

February 18, 1889, the defendant and Humphery entered into a written contract by which they agreed to exchange properties, both to be free from all incumbrances, except the "Aldine" was to be subject to two mortgages amounting to fifty-five thousand dollars, on the 1st of April, 1889, on which day the defendant was to convey the farm to Humphery, and she the "Aldine" to the defendant.

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The parties to the contract met on the day and at the place appointed, the plaintiff's office, and a deed was tendered by Mrs. Humphery to the defendant, who raised the following objections to the title: (1) That \$990 of interest was unpaid on the mortgages, and the taxes, amounting to \$1,389.83, were unpaid. (2) That Mrs. Humphery was a married woman, and her husband had not joined in the deed. (3) That a former owner of the "Aldine" was a married woman, and that her husband did not join in the deed which was executed by her April 2, 1888. (4) That the bill of sale of the furniture in the "Aldine," which was to go to the defendant, was not subscribed at the end, but at about the middle of the document.

These were the only objections specifically made on the 1st of April, 1889. On the trial the defendant raised other objections. (A) That the deed tendered by Mrs. Humphery recited that the land was subject to an agreement entered into by a former owner with the owner of an adjoining lot, that a party-wall should be maintained, one-half on the land of each, and for the mutual benefit of both properties. (B) That the deed to Mrs. Humphery recited that the land was subject to a restriction imposed by a former owner of this lot and the adjoining lots, that no buildings should be built on those lots within eight feet of the north line of the street.

The defendant rejected the title offered by Mrs. Humphery, and the contract to exchange was never performed.

The question underlying all others in this case, and which is decisive of it, is, was it the understanding of the parties to this action that the plaintiffs were not to be entitled to commissions, unless mutual conveyances of the properties contracted to be exchanged were made and accepted, or whether they were entitled to commissions when the contract of exchange was executed?

It appears by the record that the defendant, in 1882, employed the plaintiffs to effect a sale of his farm, and that for some time before the negotiations were begun, which resulted in the contract to exchange, the owner of the "Aldine" had employed the plaintiffs to sell it. It is alleged

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in the complaint that \$750 was the value and the agreed price of the services rendered by plaintiffs for the defendant. The defendant in his answer denied that he agreed to pay any definite sum, but alleged that he "agreed that if plaintiffs should be instrumental in effecting a sale of said property upon such terms and for such consideration as might be satisfactory and agreed upon by the defendant, and not otherwise, that he, the defendant, would pay to the plaintiffs a reasonable commission for their said services."

It was also alleged in the answer that February 18, 1889, the defendant and Humphery entered into a contract (a copy of which is annexed to the answer) to convey April 1, 1889, his farm, valued at thirty thousand dollars, to Humphery, in consideration that she would convey to the defendant the "Aldine," together with the furniture therein, free and clear from all incumbrance, except two mortgages amounting to fifty-five thousand dollars. The defendant also alleged that Humphery was unable to and never had performed her contract.

The defendant testified that Julius N. Kalley, one of the plaintiffs who transacted all the business in respect to the exchange, spoke to him about the "Aldine" about December 20, 1888, and that afterwards he reported to Kalley that he had examined it. The result of his examination and of subsequent conversations was that Kalley, Humphery and the defendant went some time in the month of February, 1889, to Massachusetts and examined the defendant's farm. Kalley testified that a day or two after returning from Massachusetts, the defendant and Humphery met at the office of plaintiffs, and the result of their interview was the written contract of exchange. He said: "Q. Did they (defendant and Humphery) personally carry on their negotiations face to face? A. They did; yes, sir. Q. They entered into a contract? A. Yes, sir. Q. Is that the contract mentioned in the answer here? A. Yes, sir." This witness also testified that at an interview before the parties went to Massachusetts, the following conversation was had: "Q. What did he, defendant, say? A.

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He says, if I will make a change for property down there, what will be your charge? He seemed to hammer on this. (By the court) No, not what he seemed, just state what he did absolutely say and what you said. A. He said, what will be your charge in case you make an exchange? I said, the price of two and a half per cent on the value, thirty thousand dollars, which you put on the farm." Upon this question, the defendant testified: "Q. What did he (Kalley) say? A. He said that he thought he could exchange my property free and clear for that property, free and clear of all incumbrances, except two mortgages upon it for fifty-five thousand dollars. Q. What did you say? A. I will think of the matter. Q. What was the next said between you about it? A. Nothing further at that time. Q. Well, the next time? A. The next time I told him that if I could exchange my property free and clear for the Remsen street flat, free and clear from all incumbrances, except the two mortgages. Q. (By the court) For how much? A. Two mortgages for fifty-five thousand dollars, I would do so, but I would not give him any personal property with my farm, and that if the exchange was made, I would pay him a commission. Q. What commission? A. No amount agreed upon. Q. Anything stated by him on that subject? A. He said the commission for out of town property was two and a half per cent."

There is no evidence that the plaintiffs knew anything about the title to the "Aldine;" that they made any representations in respect to it, nor does it appear that the defendant asked them to make, or cause to be made, a search.

The trial court submitted the question as to what the agreement was to the jury, instructing them as follows: "In ordinary cases, the law is well settled where a broker is employed in reference to a sale or exchange of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent,

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in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. * * * Therefore, I say to you, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts, when he (the broker) brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him. The contention is that there was a different agreement here. * * * Now, I propose to leave that question to you to determine. If you find that this was an ordinary contract, made without any conditions, the broker employed in the usual way, and that there was no bargain entered into between the plaintiffs and Mr. Baker, that they were only to be paid their commissions in case this sale went through, then plaintiffs are entitled to recover. If, however, the bargain agreed upon between Mr. Kalley and Mr. Baker was, that commission was only to be paid in case this whole transaction went through, as provided by the terms of the contract of exchange, the plaintiff is not entitled to recover unless you are satisfied from the evidence here that Mr. Baker capriciously refused to carry out the contract."

To this instruction the defendant took no exception except to that part of it which laid down the rule that ordinarily the broker "is entitled to commissions when the parties have been found satisfactory to each other and they have entered into a mutual contract of purchase and sale."

This exception presents no error. In *Knapp v. Wallace* (41 N. Y. 477), the defendant employed a broker to purchase certain real estate for a price named, agreeing to pay him one per cent on that price for his services. Through the aid and assistance of the broker a contract of sale at the price named was entered into personally between the defendant and the owner of the property. As a defense to an action brought to recover the commissions the defendant sought to show that the title of the vendor was defective, and for that reason he was unable to perform his contract. It was held "it was no

Statement of case.

defense to the plaintiff's claim that the title to the property was defective. Messmore (the broker) had not undertaken that it should be good. The contract between him and defendant did not place his right to compensation on such a condition."

When a broker, as a part of his employment, assumes to execute for his principal an executory contract of sale or exchange he does not become entitled to his commissions unless the other contracting party is able to perform the contract on his part. (*Barnes v. Roberts*, 5 Bosw. 73; *McGavock v. Woodlief*, 20 How. [U. S.] 221.)

But under the facts found, these and kindred cases have no application to this case.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

ELIZA LEGGETT, Respondent, v. CHRISTOPHER C. FIRTH,
Appellant.

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The will of F., after legacies to the testator's children and a gift to his wife "forever" of the residuary personalty, also a provision that in case the personalty was insufficient to pay said legacies enough real estate should be sold for that purpose, contained this clause "I also give, devise and bequeath to my wife Ellesheba all the rest and residue of my real estate, but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively, to be divided in equal shares between them." In an action for the specific performance of a contract for the purchase of land which formed part of the residuary real estate, title to which plaintiff claimed through the widow, *held*, that she took only a life estate; but that by necessary implication a beneficial power was conferred upon her to dispose of the residuary real estate, with a limitation over in case of her death without exercising the power; and that, therefore, she could convey a good title.

(Submitted January 26, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an

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order made June 28, 1889, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term, and awarded to the plaintiff the relief demanded in the complaint.

Action by the vendor of lands to compel the vendee to perform his agreement to purchase and pay for the same.

December 21, 1888, the parties entered into a contract, in writing and under seal, whereby the plaintiff agreed to sell and the defendant to purchase certain premises in the city of Brooklyn for the consideration of \$3,550, payable \$100 down, \$2,250 on the delivery of the deed, and the balance of \$1,200 by assuming a mortgage on the land for that amount. On the day agreed upon for performance the plaintiff tendered a deed, pursuant to the contract, but the defendant refused to accept it or pay the balance of the purchase-money. The defendant, by his answer, denied that the plaintiff owned or was possessed of said premises, and also that she was able to convey and let him into possession of the same. The trial court found that the plaintiff never owned the premises, and dismissed the complaint. The General Term reversed the judgment and made a decree for specific performance.

Further facts are stated in the opinion.

Remsen & Parsons for appellant. Equity does not compel a purchaser to accept a doubtful title. (*Seymour v. DeLancey*, 5 Cow. 714; *Shriver v. Shriver*, 86 N. Y. 575; *Toole v. Toole*, 112 id. 333; *Lockman v. Reilley*, 29 Hun, 434.) Specific performance should not be decreed against the vendee unless the vendor can give good title, and one asking specific performance must show a moral certainty that the purchaser would receive such a title as he had contracted to take. (*Hinckley v. Smith*, 51 N. Y. 21; *Bensel v. Gray*, 80 id. 517; *McPherson v. Smith*, 49 Hun, 254.) The plaintiff has not a good title unless Mrs. Flassilard had either a fee or a life estate with a power of disposition. (*Crozier v. Bray*, 39 Hun, 123; *Terry v. Wiggins*, 47 N. Y. 512; *Greyston v. Clark*, 41 Hun, 125; *Smith v. Bell*, 6 Pet. 68; *Brant v. F. C. Co.*, 93

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U. S. 326; *Bradley v. Westcott*, 13 Ves. 445; *Dashwood v. Peyton*, 18 id. 40; *Areson v. Areson*, 3 Den. 458; *Chamberlain v. Taylor*, 105 N. Y. 135.) There is no evidence of adverse possession. Defendant should be compelled to take title on this ground only when such evidence is clear and distinct. (*Shultz v. Rose*, 65 How. Pr. 75; *Ottinger v. Strosburger*, 33 Hun, 466.) The remaindermen mentioned in the will, the children of Mrs. Flassilard, or their heirs, are not parties to this action, and the courts will not compel specific performance where the validity of the vendor's title depends upon a doubtful question of law, where others having rights dependent on the same question are not parties to the action. (*Jordan v. Poillon*, 77 N. Y. 518; *Abbott v. James*, 111 id. 673, 678.) The direction contained in the early part of the will to sell the real estate if the personal property be insufficient to pay the legacies, is a cloud upon the title, as they are a charge upon the real estate and that direction is paramount to a power of disposal in the life tenant. (*A. F. Ins. Co. v. Bay*, 4 N. Y. 9.)

James C. Church and *George W. Pearsall* for respondent. The title conveyed by the widow of Flassillard was good under either one of two aspects: That she took the fee of the property; or that she had a life estate with power of sale. (*Holmes v. Shoemaker*, 22 Wend. 137; *Jackson v. LeLancy*, 13 Johns. 537; *Jackson v. Robbins*, 16 id. 537; *Roseboom v. Roseboom*, 81 N. Y. 356; *Clark v. Lupp*, 88 id. 228; 100 id. 287; *Thomas v. Walford*, 49 Hun, 145; *Colt v. Heard*, 10 id. 189; *Van Horne v. Campbell*, 100 N. Y. 294.) The judgment in favor of this plaintiff against one of the children of said Flassillard is *res adjudicata* as to the other child or his heirs. (*Malcolm v. Rogers*, 5 Cow. 193; *Herman on Estoppel*, § 154.)

VANN, J. The plaintiff claims title to the premises in question through Ellisheba Flassilard, the widow and devisee of John F. Flassilard, who died in 1857, leaving said widow and

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three minor children. By his will, written by his own hand and executed August 1, 1856, he bequeathed to each of his children the sum of one dollar, and to his wife, the household furniture and all the rest of his personal property, "after paying from the same legacies already named, to her forever," and directed that if the personal property should not be sufficient to pay said legacies, enough real estate should be sold to raise money to pay them. The remainder of the disposing part of the will was in these words, viz.: "I also give, devise and bequeath to my wife Ellisheba all the rest and residue of my real estate, but, on her decease, the remainder thereof, if any, I give and devise to my said children, or their heirs, respectively, to be divided in equal shares between them." He appointed his wife sole executrix.

At the date both of his will and of his death, he owned the premises in question, which, on the 20th of August, 1859, were mortgaged by Ellisheba Flassilard to one Pernot. The mortgage was afterwards foreclosed and the premises conveyed by the sheriff to the grantor of the plaintiff.

The question presented by this appeal is whether Mrs. Flassilard took the premises either in fee, or a life estate with power to sell, as claimed by the plaintiff, or a life estate only, as claimed by the defendant. In ascertaining the intention of the testator, which is the primary guide to the construction of his will, regard should be had to the apparent distinction between the gift of the personalty and that of the realty, as by attaching the word "forever" to the former, and withholding it from the latter, a difference in the nature of the gifts is indicated. This would be of slight importance were it not for the gift over to his children of the remainder, "if any," of his real estate already devised to his wife upon her decease, by which the intention to discriminate between the two gifts to her is emphasized. When the gift of the real estate is considered by itself, without contrasting its form with that of the personal property, we see that in a single sentence he devised it to his wife, "but on her decease," he also devised "the remainder thereof, if any," to his children. Here the

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significant words are "but" and "if any." "But," as thus used, is a word of limitation, and shows that the testator intended that the previous gift, which was apparently absolute, should not remain absolute, but should be limited by that which followed. It indicates a proviso, condition or qualification, and in connection with the rest of the sentence reduces the previous gift by carving out, not an absolute, but a possible, remainder for the children. The nature of the widow's estate is pointed out by the event, upon the happening of which the devise of the remainder is to take effect. That event is her death, and as she was to hold until that event happened, she took a life estate. (*Crozier v. Bray*, 120 N. Y. 366; *Van Horne v. Campbell*, 100 id. 287; *Wager v. Wager*, 96 id. 164; *Terry v. Wiggins*, 47 id. 512; *Norris v. Beyea*, 13 id. 280; *Smith v. Bell*, 6 Fed. 68; 1 R. S. p. 748, § 1.) But the remainder itself was in turn limited by the words "if any," which show that the testator did not intend that necessarily there would be anything left upon the death of his wife. "The remainder, if any," means the same as "if there shall be any remainder," and the gift over is of what may be left. As it would all be left unless there was a right to dispose of it, it follows by necessary implication that he intended his wife should have that power. Otherwise the words "if any" must be rejected as having no meaning whatever. As was said by the learned General Term the words under consideration "confer a beneficial power of disposition of all the property upon the wife during her life-time, with a limitation over in the event of her death without an exercise of the power. Whether the children took anything under the devise over of all the remainder depended upon a contingency, not indeed expressed, but plainly implied from the words 'if any' and the power of the primary devisee to dispose of the entire estate is implied from the same words of limitation." At common law the gift over would have been void as repugnant to the prior estate, upon the ground that a valid executory devise cannot be defeated at the will of the first taker. (*Jackson v. Bull*, 10 Johns. 19; *Van Horne v. Campbell*, 100 N. Y. 287.)

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Under the Revised Statutes, however, an expectant estate may be defeated by any means which the party creating the estate "shall in the creation thereof have provided for or authorized," and such an estate cannot be adjudged void in its creation because it is thus liable to be defeated. (4 R. S. [8th ed.] p. 2434, §§ 32, 33; *Terry v. Wiggins*, 47 N. Y. 512, 518; *Thomas v. Wolford*, 49 Hun, 145; *Colt v. Heard*, 10 id. 189.)

In *Thomas v. Wolford*, there was a devise to the first taker apparently absolute, followed by a devise over to the second taker of the same property, "should there be any left;" and in *Colt v. Hearst*, there was a similar devise to the first taker and a devise over of "such part thereof as he may have at the time of his decease," and in both cases it was held that the first devisee took a life estate with a beneficial power of sale and that the second devisee took what was left upon the death of the first.

We think that the widow took a life estate with a power of sale to be exercised during her life for her own benefit and that the children took a remainder in fee, subject to the exercise of the power. This construction gives adequate force to every word used by the testator and avoids the defeat of any part of his intention. The subject has been so fully considered by the learned justice who prepared the opinion of the General Term that we do not feel called upon to elaborate our views.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

LUCIEN BARNES, Respondent, v. JAMES R. KEENE, Appellant.

In an action by a father to recover damages for injuries to an infant child, caused by defendant's negligence, he is entitled to recover his pecuniary loss, i. e., the value of the services of the child while incapacitated because of the injury and the reasonable expenses necessarily incurred in the effort to restore the child to health.

The amount of the loss recoverable is not affected by the financial condition of the parent.

In such an action it appeared that the father, who had had experience as a nurse himself, in that capacity took the entire charge of the child; after proving the value of his services as such, he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse. *Held*, error; that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto what he might have made had he not abandoned the business engagement.

(Submitted January 27, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 27, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover the expenses incurred in nursing and treating plaintiff's infant daughter, who had been injured by the negligence of the defendant, and also to recover damages for the loss of her services.

November 30, 1882, the plaintiff's daughter, Mary, then aged eight years, was seriously injured by the negligence and inefficiency of a servant of the defendant. In an action brought by her, through her guardian *ad litem*, she recovered a judgment against the defendant for the sum of \$4,500, being the damages thus sustained by her, which was affirmed by this court. (115 N. Y. 638.)

The complaint of the father was in the usual form, except

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that the recovery of said judgment was set forth in a paragraph by itself. The defendant denied most of the allegations contained in the complaint and alleged that the accident resulting in said injuries was caused by the negligence of the said Mary. The jury rendered a verdict in favor of the plaintiff for fifteen hundred dollars.

Further facts appear in the opinion.

Shipman, Larocque & Choate for appellant. The damages were excessive. (*Cumming v. B. C. R. R. Co.*, 109 N. Y. 95; *Lehman v. City of Brooklyn*, 29 Barb. 234; *Kennedy v. N. Y. C. & H. R. R. Co.*, 35 Hun, 186.)

Samuel H. Randall for respondent. No error was committed in the admission of the judgment-roll in the guardian's action, and allowing plaintiff to read in evidence that part of the complaint therein which set forth the injuries sustained by plaintiff's child, and the defendant's exception should not be sustained. (*Anderson v. Third Ave. R. R. Co.*, 9 Daly, 487; *Simmons v. Tappen*, 2 Sweeny, 652; *Alexander v. Stokely*, 7 S. & R. 299, 302; *Green v. Clark*, 5 Den. 497; *Edwards v. Stewart*, 15 Barb. 67; *Crosby v. Day*, 81 N. Y. 242; *Bennett v. Austin*, 5 Hun, 536.) No error was committed in allowing the plaintiff to prove the expense actually incurred by him for medicines in the cure of his child; such damage had been alleged in complaint. (115 N. Y. 638; *Cumming v. R. R. Co.*, 109 N. Y. 95; *Orbann v. P. T. Co.*, 11 Cent. Rep. 628; *Crook v. Rindskopf*, 104 N. Y. 476.) Defendant's objection that plaintiff could not recover for what he lost, by being obliged to give up his situation as a theatrical manager and also for his services while nursing his child for same period, is untenable. (*Lockwood v. R. R. Co.*, 98 N. Y. 523; *Bowles v. R. R. Co.*, 46 Hun, 327; *Houghkirk v. Canal Co.*, 92 N. Y. 219; *Cook v. R. R. Co.*, 60 Cal. 604.) There was no error in the court's charge, and the exception thereto was too vague and indefinite. (*Distin v. Rose*, 69 N. Y. 122; *McGinley v. Life Ins. Co.*, 77 id. 497; *Schule v. Brokhans*, 80 id. 614.) No error was committed in the court denying the

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motion for a new trial. (*Peck v. R. R. Co.*, 70 N. Y. 587; *Leitchult v. Treadwell*, 74 id. 418; *Hayes v. Ball*, 72 id. 418; *Bowles v. R. R. Co.*, 46 Hun, 324; *R. R. Co. v. Falvey*, 1 West. Rep. 881; *Wolfe v. Trinkle*, Id. 497; *F. B. Church v. R. R. Co.*, 5 Cent. Rep. 434; *State v. Gonce*, 3 West. Rep. 805.)

VANN, J. Upon the trial of this action the plaintiff read in evidence a stipulation of the attorneys for the defendant, admitting "that through the negligence and carelessness of the person operating the defendant's elevator, the plaintiff's child, Mary T. Barnes, was injured, and that the defendant is in law liable for such negligence of the operator." The only issue left undisposed of by this stipulation related to the amount of damages that the plaintiff was entitled to recover. Those damages were in the nature of compensation for pecuniary loss and included the value of his daughter's services, as well as the reasonable expenses necessarily incurred by him in the effort to restore her to health. (*Cuming v. Brooklyn City R. R. Co.*, 109 N. Y. 95; *Drew v. Sixth Ave. R. R. Co.*, 26 id. 49; *Whitney v. Hitchcock*, 4 Den. 461; 3 Sutherland on Damages, 723.)

The plaintiff, who was the only witness sworn upon the trial, testified that at the time of the accident his occupation was that of a theatrical manager; that he had had experience as a nurse and took the entire charge of his injured daughter in that capacity. After stating the value of his services thus rendered he was asked by his counsel if by reason of the severe injury to his child he was obliged to give up a business engagement; and although the defendant objected to the question as incompetent, irrelevant and immaterial, he was permitted to answer, and did so in these words, viz.: "Yes, I was under an engagement at this time, in the eve of this injury, as theatrical manager. My compensation was fixed." He was then asked to state the rate of compensation and the term of the engagement, when the defendant objected upon the same grounds as before, and for the further reason that the plaintiff

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could not "recover for that and also recover for his services during the same period in another capacity." The court overruled the objection and the witness answered: "Fifty dollars a week and a percentage. That contract was for the term of about twenty-five weeks. I gave it up, as I said, and attended to my child." The court refused to charge, upon the request of the defendant, that the jury was not at liberty, on the evidence, to allow more for nursing than would have been paid to a competent, trained or professional nurse. Exceptions were duly taken by the defendant to each of these rulings.

Although it was not so stated upon the trial, the plaintiff now insists that this evidence was not offered for the purpose of effecting a double recovery, but as a circumstance to show his pecuniary situation and his dependence on his profession for support at the time he undertook to become the nurse of his child. But what bearing did the resources of the plaintiff have upon the actual worth of his daughter's services, or the amount that it cost him to cure her? How could dependence upon his avocation for support increase the pecuniary value of her services, or the amount necessarily incurred in caring for her? The rule governing the assessment of damages in such a case as this is compensation for pecuniary loss and the amount of that loss is not affected by the financial condition of the person sustaining it. The accidental circumstance that the loss may at the time bear more heavily upon a poor man than a rich man cannot swell the amount that the person causing that loss is legally responsible for. While the plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover, in addition thereto, what he might have made if he had not abandoned his business engagement. He could not recover for services rendered during a specified period, and for loss of time during the same period. He was entitled to have his pecuniary loss, necessarily caused by the accident, made good to him. This included the services of a nurse, as long as a nurse was needed, and if the plaintiff saw fit to act in that capacity, he was entitled to the value of his services in that capacity. But if he

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abandoned a more lucrative occupation in order to act as nurse, the value of his services while engaged in that occupation could not properly be considered by the jury in estimating the value of his services while acting as a nurse. His services as a nurse were worth no more because he was able in some other calling to earn a large income. If his time had been worth fifty dollars a day as the manager of a theatrical company, he would have been worth no more as a nurse than if he had had no other occupation except that of nursing. Although the trial judge charged that the fact that the plaintiff "abandoned a contract * * * by which he would receive fifty dollars and a percentage," was no proof that his services were worth as much as he could have earned under the contract; still, the jury were at liberty to believe that the services of the plaintiff were worth more on that account than they otherwise would have been. They may also have taken into account the loss sustained by the plaintiff in giving up a contract for twenty-five weeks with the certainty of fifty dollars a week, and the possibility of much more under the percentage. The evidence was not stricken out, and the jury were not instructed to disregard it. It was, therefore, in the case, and, subject to the limitation of the charge, was for the consideration of the jury, the same as any other evidence given on the trial. The amount of the verdict indicates that they did consider it. It was not simply immaterial, but tended to mislead the jury to the prejudice of the defendant. It was presumptively injurious, and the presumption is not rebutted by the record. It bears upon the result because it presented to the minds of the jury an improper element of damages, and, in connection with the refusal to charge, an erroneous measure of damages. (*Worrall v. Parmelee*, 1 N. Y. 519; *Baird v. Gillett*, 47 id. 186, 188.)

We cannot, therefore, disregard the error committed in admitting this evidence, but must give effect to the exceptions by reversing the judgment and ordering a new trial.

All concur.

Judgment reversed.

Statement of case.

GRANGER A. HOLLISTER et al., Respondents, v. PHILANDER MOTT, Appellant.

While in some cases the Court of Appeals may assume the existence of a fact in order to affirm a judgment, this cannot be done when the evidence in regard to it is conflicting and the trial court has not been requested to determine the fact either way.

By a building contract, the contractor agreed "to put in a sewer" to connect the houses to be erected with another sewer, and to make water connections. At the time of filing a mechanics' lien, there was nothing due under the contract, and all the payments called for by it had been made, except a sum due when the contract was completed. The contractor substantially performed the contract in other respects, but omitted to put in the sewer or to make the water connections, and the owner, after notice to the contractor, completed the work in these respects at an expense of \$180. The whole contract price was \$2,850. The owner had paid \$2,020. There was no provision in the contract that the owner should complete the work in case the contractor failed to do so, or any understanding that the former should proceed with the work, or any failure on his part to perform his obligations under the contract. In an action to foreclose the lien the court adjudged plaintiff to be entitled to a lien for the difference between the balance unpaid on the contract and the sum expended by the owner to complete it. *Held*, error; that plaintiffs' right to recover depended upon the performance of the contract by the contractor; and that there was not a substantial performance by him.

(Argued January 28, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made July 15, 1890, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

M. M. Waters for appellant. To entitle plaintiffs to a lien, the onus is upon them to prove a debt from the contractor for the identical materials used to build the owner's houses. (4 R. S. [8th ed.] 2693.) As the contract is entire the money did not become due or remain unpaid, according to the written contract, because the condition precedent was never performed.

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(*Smith v. Brady*, 17 N. Y. 173.) Parties to building contracts should be exact in the fulfillment of their agreements in the smallest particulars, and if they willfully or carelessly depart from any of them they should incur the penalty, however severe it may be. (*Smith v. Gurgety*, 4 Barb. 614; *Nolan v. Whitney*, 88 N. Y. 648; *Smith v. Brady*, 17 id. 173; *Pullman v. Corning*, 9 id. 93; *Phillips v. Gallant*, 62 id. 256, 264.)

J. E. Durand for respondents. The contractor, Huls, fully performed his contract, except in certain minor particulars, for which full compensation was allowed by the referee, and the doctrine of substantial performance applies to the case. (*Woodward v. Fuller*, 80 N. Y. 312; *Phillips v. Gallant*, 62 id. 256; *Glacius v. Black*, 50 id. 145; *Nolan v. Whitney*, 88 id. 648; *Johnson v. DePeyster*, 50 id. 666.) The evidence conclusively shows that the contractor was indebted to plaintiffs for material furnished and used in these houses in the sum of \$800 at the time of filing the mechanics' lien. (*Sheppard v. Steele*, 42 N. Y. 52.) The gross inequity of defendant's claim in this case should prevent a reversal, unless established by clear and decisive evidence. (*Wright v. Roberts*, 43 Hun, 413; *Larkin v. McMullin*, 12 N. Y. S. R. 123; *Graff v. Cunningham*, 109 N. Y. 369; *Van Clief v. Van Vechten*, 48 Hun, 304; *Miller v. Mead*, 3 N. Y. Supp. 784; 6 id. 273.)

BROWN, J. This action was brought to foreclose a mechanics' lien. April 22, 1887, the appellant entered into a contract with John H. Huls, by which Huls agreed to erect for him three dwelling-houses on land on the north side of Clifford street in the city of Rochester, according to plans and specifications set forth in the contract. Among other things, Huls was "to put in a sewer" and was to connect the houses "with the sewer said Mott had built on the south side of Clifford street last season, of the same size of sewer as used by said Mott last season, so as to drain all the cellars of said houses,

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with all the laterals for said sewers for each house. Also to put in the water-works for all of said houses."

The houses were to be completed by August, 1887, and when fully enclosed appellant was to pay Huls four hundred and fifty dollars on each house and when all the houses were built and completed according to the terms and conditions of the contract he was to pay "money enough to be equivalent to nine hundred and ninety dollars for each house."

The respondent's lien was filed October 10, 1887, and prior to that date they had furnished to said Huls lumber used in the construction of said houses of the value of more than eight hundred dollars and prior to that date payments had been made to Huls by the appellant on account of the houses amounting to \$2,020.

It appeared that after the work was commenced it was discovered that the sewer referred to in the contract as the one with which the sewer to be built by Huls was to connect was not deep enough to drain the cellars of the houses and there-upon with Huls' consent the appellant contracted with one Tripp to deepen said sewer and carry it over the course specified in the contract with Huls, so as to drain the appellant's houses, and also for the right to connect the water for said houses with water pipes to be laid by Tripp to premises adjacent to the appellant's property, and the putting in of the drain from the houses to said sewer and the water connection was by consent delayed until Tripp should complete the work undertaken by him. After Tripp's work was completed Mott notified Huls to go on and complete his contract and there-upon a disagreement arose between the parties in reference to extra expense which Huls claimed he would be put to in doing the work by reason of the deepening of the street sewer.

The evidence as to what occurred is conflicting, but the referee made no finding thereon further than "that after the completion of said houses in other respects said Huls neglected to put in the lateral sewers to said main sewer and to put in the water connections for said houses, and said Mott, after notice to said Huls, completed the same in these respects at an

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expense to himself of one hundred and eighty dollars which the same was worth," and he further found that Huls fully performed the contract on his part except in the particular stated and one or two other minor and unimportant matters, and that said houses were fully completed December 6, 1887, and he awarded the plaintiffs a lien upon the difference between the contract price and the amount expended by Mott to complete the work specified in the contract.

There was no provision in the contract for the completion of the work by the owner in the event of the failure of the contractor, nor was there any understanding between them that the owner should proceed with the work, nor was there any failure on the part of the appellant to perform his obligations under the contract, and in view of the finding quoted that Huls neglected to put in the lateral sewers and the water connection, there was an abandonment of the contract on his part, and the case cannot be distinguished from *Larkin v. McMullin* (120 N. Y. 206).

There was nothing due under the contract when the lien was filed, and it could attach only to the payments that should be earned under the contract subsequent to October tenth, and plaintiffs right to recover depended, therefore, upon the performance of the contract by Huls.

Neither can it be said that the contract was substantially performed so as to bring it within the rule applied by the referee. (*Van O'lief v. Van Vetchen*, 130 N. Y. 571.)

The respondent seeks to sustain the judgment on the ground that the contractor was justified in refusing to complete the work until the amount of the extra expense that he would have been put to from the deepening of the sewer was agreed upon. The referee, however, made no finding on that question, and was not requested to make any, and there was no determination as to what that extra expense, if any, would have been, nor whether bad faith was attributable to either party in the disagreement existing as to the amount to be allowed for that work. The evidence upon the subject was conflicting.

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While in some cases this court may assume the existence of a fact in order to affirm a judgment, we are not permitted to do so where the evidence is conflicting, and the trial court has not been requested to determine the fact either way. It follows that there was nothing due to the contractor upon which plaintiff's lien could attach, and upon the authority of *Larkin v. McMullen* and *Van Clief v. Van Vetchen* (*supra*), the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

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JOHN C. FREEMAN, as Receiver, etc., Appellant, v. HUGH J. GRANT, Sheriff, etc., Respondent.

In an action to recover damages for the alleged unlawful taking and conversion of certain goods it appeared that prior to the execution of an assignment for the benefit of creditors, the defendant, as sheriff had, under two executions against the assignors, levied upon their goods, and a subsequent sale of part of them, after payment of the execution left a surplus. Subsequent to the assignment and while the goods unsold remained in defendant's possession, other executions came into his hands under which he claimed the right to sell a sufficient quantity of the goods remaining to satisfy said executions; the assignee without admitting the defendant's claim, in order to obtain possession of the goods, made an arrangement with the sheriff in pursuance of which he paid to the latter under protest a sum sufficient, with the surplus in his hands, to make up the amount of the other executions, and defendant thereupon released his levy. *Held*, that the proof failed to sustain the allegations of unlawful taking, and there was no unlawful conversion of the surplus; that the arrangement operated to discharge any cause of action for conversion and to substitute in its stead one for money had and received.

At the close of plaintiff's case, his counsel asked the court to allow the complaint to be amended so as to conform to the facts proved. This was objected to and refused. *Held*, no error; as the effect of the amendment would be to allow a recovery upon an entirely different cause of action and this may not be done against an objection.

After the court had decided to dismiss the complaint, plaintiff's counsel asked the court to be permitted to withdraw a juror, in order to make a motion at Special Term to amend the complaint, which was denied. *Held*, no error; that it was discretionary with the court and the manner of its exercise would not be reviewed in this court.

(Argued December 2, 1891; decided March 8, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 14, 1890, which affirmed a judgment dismissing plaintiff's complaint on the trial at the Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

John B. Green for appellant. The court had power by the express provisions of the Code to grant the plaintiff's applications. (Code Civ. Pro. §§ 539, 540, 723, 3343; *Rehberg v. Mayor, etc.*, 91 N. Y. 137; *Clemence v. City of Auburn*, 66 id. 334.) If the sheriff paid the surplus over and at once seized it again, there was an unlawful taking and conversion; if he did not pay it over at all, but kept it and applied it to subsequent executions, then there was an unlawful conversion after a lawful taking. (*Minick v. City of Troy*, 83 N. Y. 514; *Sheridan v. Hopkins*, 11 Wkly. Dig. 328; *Tiffany v. Lord*, 65 N. Y. 310.) The error of the court in respect of the surplus is palpable and entitles the appellant to a reversal of the judgment and a new trial. (Code Civ. Pro. §§ 385, 539, 540, 541, 723.)

Wales F. Severance for respondent. The cause of action must be made out as alleged in the complaint, where there is an objection to the proof during the trial. (*Southwick v. F. N. Bank*, 84 N. Y. 420; *Neudecker v. Kohlberg*, 81 id. 296.) The court did not err in refusing to allow an amendment to the complaint on the trial. (Code Civ. Pro. § 723; *Phincla v. Vaughn*, 12 Barb. 215-217; *Hendricks v. Decker*, 35 id. 298-302; *Dennis v. Snell*, 54 id. 411-414; *Richtmeyer v. Remsen*, 38 N. Y. 206-209; *Smith v. City, etc.*, 37 id. 516-521; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 id. 357-362; *King v. Barnes*, 107 id. 645, 647; *Barnes v. Quigley*, 59 id. 265-268; *Dudley v. Scranton*, 57 id. 424; *Bernhard v. Seligman*, 54 id. 661, 662; *Ross v. Mather*, 51 id. 108; *Degraw v. Elmore*, 50 id. 1; *Arnold v. Emerson*, 62 id. 508; *McMichael v. Kilmer*, 76 id. 36-40; *Clinton v. Strong*, 9 Johns. 370;

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Harmony v. Bingham, 12 N. Y. 99; *Bowns v. May*, 120 id. 357-360; *Briggs v. Boyd*, 56 id. 289; *Stenton v. Jerome*, 54 id. 480; *Scholey v. Mumford*, 60 id. 498; *Southwick v. F. N. Bank*, 84 id. 420; *Messenger v. F. N. Bank*, 48 How. Pr. 542.)

PARKER, J. The complaint alleged the making of a general assignment for the benefit of creditors by the firm of Kaughran & Barrett to Miles O'Brien; an acceptance of the trust and the taking possession of the assigned property by the assignee; the plaintiff's subsequent appointment and qualification as receiver of the estate of Kaughran & Barrett, and the delivery of possession thereof by Miles O'Brien to him pursuant to the order of the court.

It further averred that during the time said assigned property was in the possession of O'Brien, the assignee, the defendant in this action, as sheriff of the city and county of New York, wrongfully and unlawfully took from the possession of said O'Brien and carried away large quantities of said goods and property so held and owned by said O'Brien as such assignee, of the value of \$19,385.12, against the protest of said assignee, and converted the said property to his own use to the damage of the said assigned estate and the plaintiff in the above amount.

The answer put in issue the allegations of the complaint, and by appropriate averments justified the acts and things done by the defendant as being in the line of his duty as sheriff.

The evidence adduced on the trial failed to support the allegations of the complaint respecting the wrongful taking of any goods from the possession of the assignee by the defendant, and its admission was objected to by defendant's counsel on the ground that it was not material or relevant to the issue. The objection was not sustained, and from the testimony resulting it appears that, prior to the execution of the assignment, the defendant, as sheriff, levied upon and took possession of certain goods belonging to Kaughran & Barrett under two

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executions aggregating about forty thousand dollars, and that a subsequent sale of part of the goods under such process resulted in a surplus of \$10,804.44. While the sheriff was in possession of the property levied on, and subsequent to the assignment and the assignee's acceptance of the trust, the defendant received other executions aggregating about nineteen thousand dollars, and he asserted to the assignee the right to sell a sufficient quantity of the goods remaining in the store to secure the balance required to satisfy such executions. Without conceding the sheriff's position to be correct, the assignee believing, as it is alleged, that the assigned estate would be benefited by a sale conducted by him rather than the sheriff, suggested a plan which he intended should permit him to take possession of the goods and sell them, and at the same time preserve for the benefit of the assigned estate such sum of about nineteen thousand dollars, provided the possession of the sheriff should prove to be without support in law. The assignee's proposals ripened into an arrangement by which the sheriff was permitted to retain the surplus, which exceeded ten thousand dollars, and in addition the assignee paid over to him about nine thousand dollars, making total moneys then in the hands of the sheriff equal to the amount due on the executions which he had received subsequent to the assignment, but under which he had levied on goods forming a part of the assigned estate. The assignee protested against the defendant's claim of right to sell the goods upon which he had levied, and insisted in doing that which he did, he did not intend to relinquish the claim that the estate was entitled to the possession of the goods then in the store; that the money was intended by him as a substitute for the goods upon which the sheriff had levied, and was a deposit made for the purpose of procuring a release from the levy. Immediately thereafter the sheriff released the goods from the levy and the assignee took possession, since which time the defendant has in no way interfered with any portion of the assigned estate. It is apparent, therefore, that the allegations of conversion of goods had no support in evidence, for those which the defendant disposed

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of and caused to be removed were rightfully sold under executions issued and levied before the assignment, and the legality of his action in that respect is not controverted.

But the plaintiff insists that there was a conversion of the surplus by the defendant ; that his complaint was broad enough to embrace it ; and, therefore, the dismissal of the complaint was error.

While the surplus came properly and lawfully into the possession of the sheriff pursuant to the sale under executions rightfully levied, still after their satisfaction he had no right to retain it, as it formed a part of the assigned estate, and had the assignee demanded it, its continued retention by the defendant would have been wrongful and would have supported an action of conversion. But the arrangement between the assignee and the sheriff operated to do away with that cause of action and to substitute in its stead one for money had and received. This conclusion is required by the testimony of the counsel for the assignee who conducted for him the negotiations with the sheriff which resulted in his retention of the surplus, and a further payment to him of about nine thousand dollars by the assignee to induce a release of the levy on a portion of the assigned estate. He testified : " My recollection is not very distinct about what did occur ; all I know was there were certain attachments or executions that had been issued and that the sheriff was in possession under those, claiming adversely to the assignee ; and the assignee, under my advice, ascertained the amount of these liens or claims against the property, and after ascertaining those, we went to the sheriff's office with a view of seeing if some arrangement could be made by which he would allow the assignee to sell and then have these liens paid out of the proceeds ; and as the result of that, without desiring in any way to determine the question of the validity of the liens, we entered into an arrangement by which a stipulation was drawn — the fund or moneys were to be taken and put in the place of the property. * * * My recollection is that the sheriff said : Here is so much money ; whether he took it in the shape of a check or whether there

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was money passed I can't state ; but he said I have got that amount of money belonging to the assignee ; the assignee went in and made a demand for it, and he said, I have got that surplus over and above these judgments, the Claffin and Kaughran judgments ; the sheriff then said he would ; he said : I will pay that over to you ; then we went into the arrangement of what we were going to do by reason of the levies he had made on the Broadway store, and he stated that unless some arrangement was made by the assignee to release those levies there by a deposit of money in lieu of the property, that he was going to sell out the property of the Broadway store.

* * * My recollection about it is, we went there and asserted that the sheriff hadn't any right to keep the money ; and he said on his part that he had this money in his hands ; and he said : I have got a levy upon the Broadway store ; it may be that the proceeds there will be sufficient to satisfy these attachments and executions ; if so, the surplus will belong to the assignee ; at that time the sheriff was in possession, and the assignee was of opinion that it was for the interest of the estate to get it out of the hands of the sheriff ; and we tried to get the sheriff to release the property, and he wouldn't do it without getting the money, and we entered into this arrangement. * * * I will not say as a matter of fact that he asserted a right against the surplus of this money that he had in his hands ; he never positively refused in the sense of saying he would not pay it over ; he said, this money is here, and if I make the executions good out of the property I have got to recognize your demand.

"Q. That is, he said if you took the money he would have to take more property? A. Yes.

"Q. And so far as simply the question of holding that money or getting more property, you told him to hold the money and not take more property? A. I told him we would enter into this arrangement."

It is quite apparent from this evidence that the sheriff was in possession of the goods belonging to the assigned estate under certain executions, and threatening to make the amount

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due thereon out of such property; that to prevent a sale by him and secure for the assignee immediate and undisputed possession, the counsel for the assignee proposed the arrangement which was finally entered into. In order to carry it out the assignee borrowed the sum of nine thousand dollars and paid it over to the sheriff, who was further permitted to retain the surplus to make up the balance which he required as a condition precedent to a surrender of possession of the goods on which he had levied. Had the surplus not been taken into account in making up the nineteen thousand dollars, the assignee would have been obliged to raise and pay over an equal amount in order to accomplish the purpose which he had in view. It seems to be clear, therefore, that whatever may have been the rights of the assignee against the sheriff as to surplus prior to the agreement, that it was the intention of the parties and the legal effect of their action to treat the surplus and the nine thousand dollars borrowed by the assignee as paid over to the sheriff to effect a common purpose, to wit: A surrender of possession to the assignee of goods out of which the sheriff threatened to make the amount due on certain executions. The sheriff had no right to demand this money nor to retain possession of the goods under the levy made after the assignment, and the assignee, by an appropriate action, might have obtained an adjudication setting aside the levy and requiring the sheriff to surrender possession of the goods to him, but believing the course adopted to be for the best interest of the estate, he paid the money under protest and in order to obtain possession. The payment thus made was not voluntary, but compulsory, and the law implies a promise to repay, the remedy being an action as for money had and received. (*Clinton v. Strong*, 9 Johns. 370; *Harmony v. Bingham*, 12 N. Y. 99; *Briggs v. Boyd*, 56 id. 289-293; *Bowns v. May*, 120 id. 357-360.)

The cause of action alleged in the complaint, however, was not for the recovery of money involuntarily paid to the defendant, but for the wrongful taking by the defendant from the assignee O'Brien of "dry goods, fixtures, attachments and

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personal property," and the testimony presented did not tend to establish it. As the evidence adduced pointing to a different cause of action was seasonably objected to, it was not error for the court to dismiss the complaint. (*Southwick v. First National Bank*, 84 N. Y. 420.)

At the close of the plaintiff's case his counsel asked the court to so amend the complaint as to conform to the facts proved. The request was denied. As appears from the observations already made, the effect of granting the motion would have permitted a recovery upon an entirely different cause of action from that set forth in the complaint, and that may not ordinarily be done on the trial against the objection of the other party. (*Barnes v. Quigley*, 59 N. Y. 265; *McMichael v. Kilmer*, 76 id. 36; *Arnold v. Angell*, 62 id. 508.)

Subsequently, and after the court had decided to dismiss the complaint, plaintiffs' counsel asked to be permitted to withdraw a juror, so as to permit a motion to be made at Special Term to amend the complaint. This request was also denied. The disposition of such an application rests so largely in the discretion of a trial court that the manner of its exercise after an affirmance by the General Term will not be reviewed here.

The judgment should be affirmed.

All concur, except POTTER, J., not voting.

Judgment affirmed.

MARY HOTALING et al., Appellants, v. HARRIET ANN MARSH et al., Respondents, et al., Appellants.

P. died leaving him surviving his widow, a daughter and five grandchildren, two of them children of the daughter, three the children of deceased sons; he died seized of four parcels of real estate. By his will he directed his executors, if his widow consented, to sell said real estate, invest one-third of the proceeds and pay the income therefrom to his widow during her life in lieu of dower, and after her death divide the principal among his grandchildren then surviving; one-third he gave to his daughter, the other third to his daughters-in-law and their children. The testator directed his executors to dispose of his residu-

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ary estate or put it in shape to divide equally among his said grandchildren "whenever either shall become of age." The will then contained this clause: "It may so happen that my daughter * * * may live to have other children after my death, and after my executors may have divided my estate; in that case, it is my wish that they come in and share in the estate left my wife after her death in preference to the others, so that all my grandchildren may eventually receive the same amount." The widow refused to accept the provision made for her. In pursuance of a judgment in a suit for the partition and sale of the four parcels, three of them were sold, one-third of the proceeds being brought into court and the proceeds invested, the income to be paid to the widow during life as and for her dower interest. Thereafter, and during the life of the widow and before a division of the residuary estate, a child was born of the testator's daughter. *Held*, that the intent of the testator was to provide for every child born of his daughter after his death, and so that G., the child so born, was entitled to the benefit of the provision, although born before a division; also, that the refusal of the widow to accept the provision made for her did not operate to deprive the child so born of such benefit.

The original judgment in the partition suit provided that the principal of the one-third directed to be invested for the benefit of the testator's widow should at her death be divided among the survivors of the five grandchildren, "subject to open and let in and share in the same" any child the testator's daughter "shall have previously had lawfully born to her after the death of said testator, who shall then survive, and provided also that if previously to the birth of said after-born child a division of the residuary estate of the said testator shall have been made, * * * then said after-born child shall be preferred out of the said principal sum * * * to the extent, so far as may be, of making them equal with said five grandchildren." It was claimed that by this provision the after-born child could not share because born previous to the distribution of the residuary estate. *Held*, untenable; also, that, if necessary, the court would have power to amend the judgment.

In an action brought before the birth of G. to obtain a construction of the residuary clauses of the will, it was adjudged that the residuary estate vested at the time of the testator's death in his five grandchildren, subject to open and let in any child lawfully born of the testator's daughter previous to either of the five grandchildren coming of age, and as one of said grandchildren had arrived of age and no child had been born of the daughter, that no child so born thereafter "would be entitled to any share in the said residuary estate." *Held*, that assuming G. was bound by said judgment, it did not affect her right to share in the principal of the one-third set apart for the widow; that it only determined her right to share in the residuary estate, which she did not claim.

Upon an accounting by the executors, G., then an infant, appeared by guardian. The surrogate, in his final decree, distributed the residuary

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estate among the other grandchildren, excluding G. Held, assuming the decree to be binding upon her, it did not affect the question under consideration here.

(Argued January 22, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon two orders made March 14, 1889, one of which affirmed a judgment in favor of plaintiffs entered upon an order of Special Term confirming the report of a referee, and the other affirmed an interlocutory order modifying the report of said referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

W. H. Atwood for appellant Peters. By no rule of legal construction can Grace S. Marsh be deemed to be a residuary legatee under the third item of said will, entitled to share in any part of testator's residuary estate, or to be paid any preferential sum from any substituted fund, on account of such residuary share. Any construction which would make her a residuary legatee is against the Statute of Perpetuities and void as an illegal restraint on alienation. (*O'Connor v. Higgins*, 113 N. Y. 511; *In re Underhill*, 117 id. 471.) No child born to Harriet Ann Marsh, after the plaintiff Clarence Peters arrived at age, can share in the residuary estate. (*Tucker v. Bishop*, 16 N. Y. 402-404; *Collin v. Collin*, 1 Barb. Ch. 630-637; 2 Jarman on Wills, 75-77; 1 Roper on Legacies, 467; *Hawley v. James*, 16 Wend. 61; *Coster v. Lorillard*, 14 id. 265; *Andrews v. Partington*, 3 Brown's C. C. 401; *Everett v. Everett*, 29 N. Y. 39, 71, 75; *Smith v. Edwards*, 88 id. 92; *In re Lapham*, 37 Hun, 15; *Roe v. Vingut*, 117 N. Y. 204; *Loder v. Hatfield*, 71 id. 92.) Where a clause of a will is susceptible of a legal as well as an illegal construction, it is the duty of the court to seize upon the former so as to give full force and effect to the testamentary disposition. (*Roe v. Vingut*, 117 N. Y. 211; *Butler v. Butler*, 3 Barb. Ch. 304; *DuBois v. Ray*, 35 N. Y. 162; *Grover v.*

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Wakeman, 11 Wend. 193; *Mason v. Jones*, 2 Barb. 244; *Atkinson v. Atkinson*, 3 P. Wms. 260; *Thellusson v. Woodford*, 4 Ves. 312; *Vernon v. Vernon*, 53 N. Y. 351, 361; *Thomas v. Snyder*, 43 Hun, 14; *Freeman v. Smith*, 60 How. Pr. 311; *Wood v. Mitchell*, 61 id. 48.) This proceeding is taken at the foot of the judgment in this action, and is to be considered in aid thereof and not hostile thereto, and cannot change the terms and provisions thereof. (Redf. Sur. Pr. 352; *Adair v. Brimmer*, 74 N. Y. 539; *Wilcox v. Smith*, 26 Barb. 340.) Applying the argument *reductio ad absurdum* to this case, it cannot be claimed for an instant that had there been no actual payment from the residuary estate to the other legatees by the executors before the accounting, that Grace S. Marsh, being then in court, would have been entitled to share therein. (*Morgan v. Darden*, 3 Dem. 203.)

Charles Simkpins for appellant Simkpins. This is not a special proceeding, but a motion made at chambers. Section 3240 of the Code provides that costs are in the discretion of the court when they are not regulated by law. This action is for partition, and is regulated by law, and the costs have already been given in the original judgment and cannot be given again. (*In re N. Y. & W. R. R. Co.*, 26 Hun, 592; *Stanton v. King*, 76 N. Y. 585; *In re P. & H. I. R. R. Co.*, 67 id. 371; *Matler v. Holden*, 126 id. 589; *Savage v. Darrow*, 4 How. Pr. 74; *Pennell v. Wilson*, 2 Abb. [N. S.] 466; 5 Robt. 774; *In re N. Y. P. E. P. School*, 24 How. Pr. 367.) The General Term erred in giving judgment for costs in the sum of \$104, and ten dollars costs of the order of affirmance, when the appeals are from orders and not from the judgment. (*Jordan v. Van Epps*, 85 N. Y. 427; *Hunt v. Hunt*, 72 id. 218; *Jenkins v. Fahey*, 73 id. 355; *Prior v. Prior*, 49 Hun, 502; *Clemens v. Clemens*, 37 N. Y. 59; *Levitt v. Wolcott*, 95 id. 219; *Griffin v. L. I. P. R. Co.*, 102 id. 449; *Patrick v. Shaffer*, 94 id. 430; *Nemetty v. Naylor*, 100 id. 562; *Blakley v. Calder*, 15 id. 617; *Howell v. Mills*, 56 id. 226; *Cromwell v. Hull*, 97 id. 209; *Woodhull v. Little*, 102 id. 165; *Bobb v.*

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Graham, 89 Mo. 200.) Grace S. Marsh is only entitled, by the terms and provisions of the judgment herein, to an equal share and interest with the five grandchildren living at testator's death, in the one-third of the proceeds of sale of 177 Reade street, and the said fund, as provided in said judgment. (*Brevort v. Brevort*, 70 N. Y. 136; *Monarque v. Monarque*, 80 id. 320; *Ferries v. Payne*, 81 N. Y. 82; *Vincent v. Newhouse*, 83 id. 505; *Moore v. Lyon*, 25 Wend. 119; *Mangan v. Field*, 48 N. Y. 668; *Livingston v. Green*, 52 id. 118; *O'Connor v. Higgins*, 113 id. 517; *In re Underhill*, 117 id. 474.) By rejecting the provisions of the will, the widow assents to all the terms and conditions annexed to it. (*Chamberlain v. Chamberlain*, 43 N. Y. 440; *In re Benson*, 94 id. 509; *Hanley v. James*, 16 Wend. 61, 254.) No child born to Harriet Ann Marsh is entitled to participate in any preferential sum after Clarence Peters arrived at age. (*Tucker v. Bishop*, 16 N. Y. 402; *Everett v. Everett*, 29 id. 37, 71, 75; *Smith v. Edwards*, 88 id. 92; *Walter v. Lapham*, 37 Hun, 15; *Collin v. Collin*, 1 Barb. Ch. 630; *Hadley v. Jones*, 16 Wend. 61; *Coster v. Lorillard*, 14 id. 61; 81 id. 82; 83 id. 505; 48 id. 668; 52 id. 118; 25 Wend. 119; 2 Jarman on Wills, 639; 5 Dem. 531.) Grace S. Marsh, having had her day in court, is estopped by it. (*Hyland v. Baxter*, 98 N. Y. 110; *In re Hood*, 90 id. 512; *Vanderpoel v. Van Valkenburgh*, 6 id. 190.)

John C. Gulick for respondent Grace S. Marsh. The renunciation by the widow of the provisions of the will in her favor, and her election to take dower did not affect or prejudice the right of the grandchildren, who were the remaindermen of her share. (1 R. S. 725, § 32; *Moore v. Littel*, 41 N. Y. 66.) The infant, Grace S. Marsh, is entitled, as after-born issue of testator's daughter, Harriet Ann Marsh, to be let in under the will of said testator and share with his other grandchildren. (*Reed v. Reed*, 46 Hun, 212; 11 N. Y. S. R. 524; *Cromwell v. Hull*, 97 N. Y. 209; *Nemetty v. Naylor*, 100 id. 562; *Griffin v. L. I. R. R. Co.*, 102 id. 449.) This respondent,

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the infant, claims that she is first to be paid an amount equal to that heretofore received by the other grandchildren, and then to receive an equal share of the balance, and that thus only can she be preferred in order to make her on an entire equality. (*Ritch v. Hawxhurst*, 114 N. Y. 512; *Masterson v. Townshend*, 123 id. 458; 1 Jarman on Wills, 534, 542; 2 id. 700, 704; *Stevenson v. Leslie*, 70 N. Y. 512; *Tucker v. Bishop*, 16 id. 402; *Everitt v. Everitt*, 29 id. 71; *Bank of Poughkeepsie v. Hasbrouck*, 6 id. 221; *Smith v. Wyckoff*, 11 Paige, 49; *Graham v. Dickinson*, 3 Barb. Ch. 169; *Acer v. Hotchkiss*, 97 N. Y. 395.)

Valentine Marsh for other respondents. The will of Abel S. Peters devised a valid remainder limited upon the life estate in his widow, whether as dowress or devisee, to such of his grandchildren then living, or thereafter, and previous to the death of his said widow to be born, as should survive his said widow. (*Nodine v. Greenfield*, 7 Paige, 544; *Monarque v. Monarque*, 80 N. Y. 326; *Moore v. Littel*, 41 id. 66; *Miller v. McBlain*, 98 id. 517; *In re Ryder*, 11 Paige, 185; *Carmichael v. Carmichael*, 41 N. Y. 346; *In re Brown*, 93 id. 299; *Sears v. Russell*, 8 Gray, 86; *Rich v. Waters*, 22 Pick. 563; *McClung v. McMillan*, 1 Heisk. 655; *Bridgewater v. Gordon*, 2 Sneed, 5; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Cole v. Creyon*, 1 Hill's Ch. 311; *Leeming v. Sherratt*, 2 Hare, 14.) Harriet Ann Peters was a party to this action, and her rights were passed upon herein, and she is bound hereby. (*Helck v. Reinheimer*, 105 N. Y. 470; *Embury v. Conner*, 3 N. Y. 511.) Even though strict rights may have been waived and some errors committed in the original proceedings which terminated in the decree entered herein, still all parties thereto are bound by it; their remedy was by appeal. (*Reed v. Reed*, 46 Hun, 212; *Griffin v. L. I. R. R. Co.*, 102 N. Y. 449; *Clemens v. Clemens*, 37 id. 59.) Under this judgment and decree the interest of Harriet Ann Peters in said one-third, she being a party thereto and having failed to survive her grandmother, has become divested. (*Adams v.*

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Beekman, 1 Paige, 631.) Upon the death of testator's widow, the principal of said one-third vested absolutely in the grandchildren, whether alive at the time of testator's death or after-born, who then survived as tenants in common. (*Kilpatrick v. Johnson*, 15 N. Y. 322; *Cole v. Creyon*, 1 Hill's Ch. 311; *Monarque v. Monarque*, 80 N. Y. 320.)

HAIGHT, J. Abel S. Peters died on the 14th day of May, 1859, leaving a last will and testament, which was duly proved and admitted to probate before the surrogate of the city and county of New York on the twentieth day of September thereafter. He left him surviving his widow, Harriet Peters; Harriet Ann Marsh, his only surviving child; Clarence Peters, Franklin Peters, Harriet Ann Peters, children of the testator's deceased sons, Milton and Franklin; Mary Hotaling and Ellen Campbell, formerly widows of his deceased sons; Valentine Marsh and Frank Marsh, sons of the testator's daughter, Harriet Ann Marsh, his only legatees and heirs at law.

This action was commenced on the 14th day of November, 1859, for a partition and sale of four parcels of real estate of which the testator died seized, and final judgment was entered therein on the 18th day of November, 1861. Under such judgment three of the parcels were sold, but that known as No. 177 Reed street, in the city of New York, has never been sold.

On January 30, 1870, Grace S. Marsh was born of the defendant Harriet Ann Marsh, and on the 14th day of January, 1888, on her petition, an order was made that she be made a party defendant to this action, and that a reference be had to ascertain her right, share and interest in and to the premises in question, etc.

Under the final judgment originally entered in this action, one-third of the proceeds arising from the sale of the three parcels of real estate was brought into court and deposited with the chamberlain of the city and county of New York, with directions to invest the same and to pay the interest accruing thereon to Harriet Peters, the widow of the testator, during

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her life, as and for her dower interest in the premises sold. She died on the 24th day of September, 1887. The Special Term ordered judgment that the infant Grace S. Marsh was entitled to be preferred out of the principal sum to be divided upon the death of Harriet Peters, the widow of the testator, to the extent of making her on an equality with the five other grandchildren who participated in the division of the residuary estate of the testator. Her right to be so preferred is the question presented upon this review. It involves a construction of the testator's will.

In the second clause the testator describes the four parcels of real estate for which this action was originally brought to partition, and then empowered his executors to dispose of the same if his widow consent, and invest one-third of the proceeds in bonds and mortgages, the interest of which they were directed to pay her semi-annually during her life, and after her death divide the same among his grandchildren that survived her. Of the remaining two-thirds he gave one-half to his daughter Harriet Ann, and the other half was disposed of between his daughters-in-law and their children.

The third clause of the will provides that: "Of all my other estate, whether real or personal, held by me or in trust for me at the time of my death, it is my wish that my executors dispose of the same or put it in shape to divide among my grandchildren so that each may receive their share on becoming of age, for which purpose I hereby authorize them to sell all or a part of the whole, or divide up and hold such part as they may think to the interest of the youngest ones, for instance: The two front and rear houses Nos. 134 and 136 West 13th street is lease property, and now pays double what the principal would if sold, all of which my said executors shall divide equally as near as may be among my grandchildren, viz., the children of my daughter Harriet Ann Marsh, and the children of my two sons Milton and Franklin, of the latter is Clarence Peters, Franklin Peters and Harriet Ann Peters, or their survivors, whenever either shall become of age. It may so happen that my daughter Harriet Ann may live to have other children

after my death, and after my executors may have divided my estate. In that case it is my wish that they come in and share in the estate left my wife, after her death, in preference to the others, so that all my grandchildren may eventually, as near as may be receive the same amount."

The widow refused to accept the provision made for her in the will and she was, therefore, awarded dower instead.

It is true that Grace S. Marsh was not born after the executors divided the residuary estate, but she was born after the death of the testator and before the death of his widow and the distribution of that portion of his estate set apart for her use during her life.

"It may so happen that my daughter Harriet Ann may live to have other children after my death and after my executors may have divided my estate." The word "and" is used to connect two phrases, from which it is argued that the child must be born both after the death of the testator and after his executors had divided his estate, in order to be entitled to the provision. He had in his will named his living grandchildren and made provision for each. He also made provisions for after-born children of his daughter Harriet Ann. No reason is shown why he should exclude those born after his death and before the distribution of his estate, and still bring in those born after the distribution. In construing wills the court may transpose, reject or supply words in order that the intention of the testator may be expressed and carried out and to avoid absurd and unjust results. He evidently intended to provide for every child born of his daughter either after his death or after the distribution of his estate.

The refusal of the widow to accept the provision made for her in the will in lieu of dower cannot operate to disinherit the infant Grace, or deprive her of the provision made for her as an after-born child. These rights were recognized and provided for in the original judgment entered herein thirty years ago, in which all the heirs at law and legatees, other than the infant Grace, were parties, and they are consequently bound thereby. As to the remainder of the clause the language of

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the will is clear and specific and the testator could not well have expressed his intention in plainer words: "It is my wish that they come in and share in the estate left my wife after her death in preference to the others, so that all my grandchildren may eventually, as near as may be, receive the same amount."

Indeed, we do not understand his intention as determined and adjudged by the Special Term to be seriously questioned, but the claim is made that under the provisions of the original judgment entered herein Grace cannot be preferred out of the third reserved for the widow, for the reason that she was born before there was a division of the residuary estate. That judgment provided as we have seen that one-third of the proceeds of the sale of the real estate be paid to the chamberlain to be invested and the interest to be paid to Harriet Peters, the widow, during her life, and at her death the principal sum so invested to be divided between the five grandchildren of the testator, or such of them as should survive, "subject, however, to open and let in to share in the same any children that said Harriet Ann Marsh shall have previously had lawfully born to her after the death of said testator, who shall then survive, and provided also that if previously to the birth of said after-born children a division of the residuary estate of the said testator shall have been made by said executors between said five grandchildren, or the survivors of them, then said after-born children shall be preferred out of the said principal sum to be divided upon the death of said Harriet Peters to the extent as far as may be of making them equal with said five grandchildren."

We thus have the language of the decree providing for the opening thereof to let in any child or children of Harriet Ann Marsh born to her after the death of the testator who shall then survive, and that such after-born child or children shall be preferred out of the principal sum to be divided on the death of the widow, and yet under the proviso it is claimed that such child or children cannot share such principal sum if they were born previously to the distribution of the residu-

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ary estate. Such proviso could not have correctly expressed the intention of the court, for it was held, as we shall subsequently show, that such child or children had no part or interest in such residuary estate. We think the construction contended for ought not and should not prevail. It is contrary to the expressed wish of the testator as well as the evident intention of the court, as is apparent from the other provisions of the judgment. This is a proceeding in the action and upon the judgment entered. Grace has been made a party, and if necessary the court would have power to amend the judgment in that regard in order that the will of the testator might be carried out. But under the view taken by us, the judgment as entered should receive a reasonable construction, the one which was evidently intended by the court, and which will carry out the intention of the testator.

On the 10th of May, 1861, an action was brought to have the clauses of the will marked "thirdly" and "lastly" construed, and thereupon judgment was entered on the 4th day of December, 1862, in which it was adjudged that the residuary estate of the testator vested at the time of his death in his five grandchildren (naming them); "that said residuary estate so vested in said five grandchildren subject to open and let in any children lawfully born of the defendant Harriet Ann Marsh previous to either of the testator's grandchildren arriving at lawful age; that said grandchildren take in equal shares, each to receive his or her share on arriving at lawful age, and the said defendant Harriet Ann Marsh having had no children born to her since the death of said testator and the defendant Clarence Peters having arrived at lawful age in less than three months after the death of the testator, as found by said decision, it is also adjudged and decreed that said defendant Clarence Peters was so entitled to receive his share on so arriving at lawful age, and that no child born to said Harriet Ann Marsh after the said Clarence so arrived at lawful age would be entitled to any share in said residuary estate."

It is claimed that Grace is bound by this judgment, and that under it she is precluded from taking any share in the estate

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under the will for the reason that she was not born until after Clarence arrived at lawful age. The court, in ordering judgment in that case, doubtless intended to follow the rule adopted in the case of *Tucker v. Bishop* (16 N. Y. 402), and it is claimed to be binding upon Grace under the authority of *Brevoort v. Brevoort* (70 N. Y. 136), and *Monarque v. Monarque* (80 N. Y. 320). But without considering these questions for the purposes of this argument we will assume that the judgment construing the will was correct, and that it is binding upon Grace. It adjudges that no child born to Harriet Ann Marsh after Clarence Peters arrived at lawful age would be entitled to any share in the residuary estate of the testator, and he having arrived at age within three months after the testator's death, it follows that Grace had no interest or share in such estate. But she is not here claiming any interest in such residuary estate. The will purports to give her no interest or share in the residuary. The interest or share given her is in the proceeds of the four parcels of real estate which was disposed of by the second clause of the will. Her share was to be preferred and paid out of the third of the proceeds set apart for the use of the widow during her life. No construction of this clause was asked for or had in the action that was brought to construe the will. The construction was as to the third clause and to the residuary estate therein mentioned which embraced "All my other estate, whether real or personal, held by me or in trust for me at the time of my death."

True, the preference under which Grace maintains her claim is incorporated at the end of the third clause, but that clause received construction or adjudication in that action, only in so far as it pertained to the residuary estate, and not as to the four parcels of real estate disposed of under the second clause.

Again, it appears that on the 17th day of June, 1870, an accounting was had by the executors before the surrogate; that on such accounting Grace, then an infant of six months, appeared by a special guardian, and that the surrogate in his final decree on that date entered, distributed the residuary estate among the five grandchildren excluding Grace, thus fol-

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lowing the judgment of the court entered upon the construction of the will.

Assuming this decree to be binding upon her, it has nothing to do with the question under consideration, for as we have already shown, she is not asking for or claiming any interest in the residuary estate.

We have considered the other questions presented, but find none that point to error.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN T. WILLETS et al., Respondents, v. ORINAL C. HATCH,
Appellant.

While it is the duty of a creditor to whom property has been delivered as security for a debt, to use ordinary care for its protection and preservation, in determining what constitutes such care, the nature and value of the property and the means of protection possessed by the bailee, the relation of the parties and other circumstances must be considered.

Defendant indorsed and delivered to plaintiffs a warehouse receipt for certain wet salted calf skins as security for a call loan. In an action to recover on the loan defendant sought to counter-claim damages resulting from a deterioration of the calf skins while in the warehouse, alleged to have been caused by plaintiffs' neglect to care for them. It appeared that plaintiffs gave no personal attention to the skins while in the warehouse and exercised no supervision over them; that defendant had free access to them and frequently went to the warehouse and examined them. The skins were all piled together and the injury was caused by the heating of those in the center of the pile; this did not appear upon the surface of the pile. When defendant discovered that the skins were injured he called plaintiffs' attention to it and advised that they be resalted or tanned; plaintiffs declined to do either; defendant also proposed to take them to his own warehouse and treat them. Plaintiffs did not consent, but suggested that defendant pay the debt and take the skins. *Held*, that while the legal title to the property was vested in plaintiffs and the warehousemen were their bailees, defendant had at least an equal interest in the preservation of the property, the bailment being for the mutual benefit of the parties, and no duty devolved upon the former to cause it to be handled over and inspected; that plaintiffs were not required to permit defendant to take it to his own warehouse, and whether, under the circumstances, it was their duty

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to take some action for its preservation after being advised of its deterioration, for neglect to perform which they were liable, was properly submitted to the jury.

(Argued January 25, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made May 9, 1890, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and affirmed an order denying a motion for a new trial.

In July, 1886, the plaintiffs loaned to the defendant \$2,400. At the time the application was made for the loan, the defendant had recently imported from Ireland a quantity of wet salted calf skins, which were then on board a vessel in New York harbor. He offered them as collateral security. The skins, by the understanding of the parties, were taken by the defendant to the warehouse of Shultz, Innes & Co., their receipt delivered to him, who indorsed and delivered it to the plaintiffs. This action was brought in August, 1888, to recover the balance alleged to be due the plaintiffs on account of the loan. The defendant, by way of counter-claim, alleged that, by the fault and neglect of the plaintiffs, the calf skins became greatly impaired in condition and value, and that as the consequence the defendant sustained damages, for the amount of which he demanded relief. There was no abatement of the plaintiffs' recovery by reason of the alleged counter-claim.

Further facts are stated in the opinion.

John McDonald for appellant. There was no conflicting evidence upon any material fact. The single question presented to the trial court for solution was, therefore, one of law, and it was error to submit that question to the jury. (*Tabor v. Hopkins*, 4 N. Y. 548; *Pratt v. Hull*, 13 Johns. 334; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 465; *Edgell v. Hart*, 9 id. 217; *Ernst v. H. R. R. Co.*, 24 How. Pr. 103; *Groat v. Gile*, 51 N. Y. 441.) The indorsement and delivery of the warehouse receipt by the defendant to the plaintiffs had precisely the same legal effect, and imposed

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upon the plaintiffs the same duties and responsibility as if the skins themselves had been delivered bodily into their hands. (Story on Sales, §§ 311, 312; 2 Kent's Comm. 500; Benjamin on Sales, §§ 1043, 1044; 1 Para. on Cont. 531; *Hayden v. Demet*, 53 N. Y. 429; *Gregory v. Wendell*, 39 Mich. 340; *Wilkes v. Ferris*, 5 Johns. 343; *Davis v. Green*, 24 N. Y. 643; *Burton v. Curyea*, 40 Ill. 320; *Padden v. Taylor*, 44 N. Y. 375; *Horr v. Barker*, 8 Cal. 614; *Hatch v. Bailey*, 12 Cush. 29; *McCormick v. Hadden*, 37 Ill. 379; *Whitlock v. Hoag*, 58 N. Y. 487; *Davis v. N. E. Bank*, 91 U. S. 633; *Barber v. Meyerstein*, L. R. [4 H. L.] 317; *Markham v. Jandon*, 41 N. Y. 241; *Wheeler v. Neubold*, 16 id. 396; *Stief v. Hart*, 1 id. 39; *Bank of Rochester v. Jones*, 4 id. 507; *Gibbons v. Stevens*, 8 How. [U. S.] 384; *Yenni v. McNamee*, 45 N. Y. 621.) The plaintiffs, thus having the legal title and the actual possession of the skins, were bound to ordinary diligence in the care and preservation of them and, as they did not use ordinary diligence in the care and preservation thereof, they must answer to the defendant for the consequent loss inflicted upon him by their negligence. (*Cutting v. Marlor*, 78 N. Y. 454; *St. Losky v. Davidson*, 6 Cal. 647; 2 Story on Bailments, §§ 11, 17, 332, 341, 496; 2 Para. on Cont. 110; Jones on Pledges, §§ 403, 405, 409, 412; Edwards on Bailments, §§ 235, 296; *G. F. & M. Ins. Co. v. Marr*, 46 Penn. St. 504; *Hanna v. Holton*, 78 id. 336; *Russell v. Hester*, 10 Ala. 535; *Slevin v. Morrow*, 4 Ind. 425; *Cardin v. Stone*, 23 Ga. 181; *Lawrence v. McCalmant*, 2 How. [U. S.] 454.)

Wilson M. Powell for respondents.

BRADLEY, J. The controversy at the trial had relation to the defendant's claim for damages arising from the deterioration of the calf skins during the time they were in the warehouse of Schultz, Innes & Co. They were placed there by the defendant in July, 1886, where they remained until in July, 1887, when they were found to be in such an impaired condition as to have but little value. The number of these skins

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was 2,748. They were contained in 458 bundles, all in one pile, the inside of which had become heated, and the skins there were in the process of decay.

The question presented at the trial was whether or not this condition and the consequent loss were chargeable to the failure of the plaintiffs to perform any duty assumed by or imposed upon them when they, as collateral for their loan to defendant, received from him the warehouse receipt and the right of property represented by it. There was not any substantial dispute about the facts, and the defendant insisted that the plaintiffs were chargeable with the loss resulting from the injury to the property of which they held the receipt. And this charge is founded upon the proposition that during that time they had the legal title to and the possession of the skins. They did have the legal title, and the indorsement and delivery of the warehouse receipt was a symbolical or constructive delivery of the possession of the goods to the plaintiffs. (2 Kent's Com. 500; *Wilkes v. Ferris*, 5 Johns. 335; *Gibson v. Stevens*, 8 How. [U. S.] 384, 399.) The effect is similar to that given to the delivery of or transfer for such purpose of a bill of lading. This vests the title, and in support of it in like manner transfers the possession of the goods represented by the bill. (*First National Bank of Cincinnati v. Kelly*, 57 N. Y. 34; *Marine Bank v. Fiske*, 71 id. 353; *Commercial Bank v. Pfeiffer*, 108 id. 242.) And this may be accomplished although the property is remote from the place at which the transaction occurs, and such documentary evidence of title is delivered and taken. In the eye of the law, the person to whom the warehouse receipt of bill of lading is properly delivered or transferred for such purpose, takes the possession of the goods covered by it. Both parties to the transaction, when the transfer is so made as collateral security, have an interest in the goods and in their preservation. The one has the legal title in support of his special property in them, and the equitable interest of the other is for the purpose of satisfying his debt; and in view of any surplus which may remain in the event of their appropriation to such

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purpose. When the warehouse receipt was indorsed and delivered to the plaintiffs, it evidently was contemplated that the skins should remain where they were until the debt should be paid. And in the meantime there was not, nor could properly be, any obstruction to the defendant's access to them for the purposes of negotiating a sale of the skins with a view to realize funds for the payment of the debt, or do anything not inconsistent with the rights of the plaintiffs. This the defendant understood, and as often as weekly, except a small portion of the time when he was physically unable to do so, went into the warehouse, examined the skins as much as he pleased, and from time to time was there with persons to whom he sought to make sale of them. The plaintiffs gave no personal attention to the property. They did not see the skins before they were taken to, nor while they were at the warehouse of Schultz, Innes & Co. Nor did they exercise any supervision over them. They relied solely upon their possession of the receipt for the protection of the security furnished by the property.

The defendant's counsel contends that the plaintiffs were charged with the duty of exercising care which they negligently failed to bestow for the preservation of the property from deterioration. And it was in that view that the court was requested to direct the jury to find for the plaintiffs such amount only, as remained of their claim after deducting therefrom \$1,703.75, the amount of the alleged counter-claim. This the court declined and charged the jury to the effect that while a pledgee is chargeable with ordinary care, what constitutes such care is dependent upon circumstances, and submitted to them the question whether under the circumstances in the present case the plaintiffs failed to exercise the care assumed by, or which was due from them in that respect. Upon the refusal to charge as requested and to the instruction given exceptions were taken. And the court also charged that if the plaintiffs had taken the goods into their own custody they would have been chargeable for the damages. The loan was made to the defendant for no definite time. It was subject to call by the plaintiffs and to payment at any time by the

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defendant. The latter resided in the city and it evidently was contemplated that he would negotiate a sale of the skins, which he ineffectually sought to do. They were accessible to and frequently seen by him. His interest in their preservation was at least equal to that of the plaintiffs. The latter were not advised how long the payment of the debt would be delayed and the property remain in store. For aught they knew, their relation to the property might any day be terminated by the satisfaction of their claim. It cannot under the circumstances be assumed that the plaintiffs were required to cause the property to be handled over and inspected, nor that any such undertaking on their part was within the contemplation of the parties. There is no question about the duty of a creditor who has become bailee of property transferred to and taken possession of by him as security, to use ordinary care for its protection and preservation, but as said in *Cutting v. Marlow* (78 N. Y. 458), "in determining what constitutes such care the nature and value of the property and the means of protection possessed by the bailee and the relation of the parties and other circumstances, must be considered." If the plaintiffs had taken the actual custody of this property and assumed the exclusive dominion over it, a different question than is now presented may have arisen. And such was the nature of the cases to which our attention is called by the defendant's counsel. (2 Kent's Com. 587; *Wheeler v. Newbould*, 16 N. Y. 392; *G. F. & M. Ins. Co. v. Marr*, 46 Penn. St. 504; *Hanna v. Holton*, 78 id. 334.) But that was not the situation nor so treated in the present case. The plaintiffs held the warehouse receipt, and had the legal rights which it afforded. The warehousemen were in that sense their bailees, but the bailment was, nevertheless, for the mutual benefit of the parties, and the defendant was at liberty to terminate at any time the plaintiffs' relation to the property by payment of the debt, and in the meantime it was subject to his inspection. The plaintiffs could not foresee any day that the receipt may not have been taken up by the defendant the following day. Then it seems that the surface appearance of the

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skins to observation was not such as to disclose the condition of those within and at the bottom of the pile. And although the defendant frequently examined them he failed to discover any impairment of the skins until about the 1st of June, 1887. The evidence tends to prove that he thereafter called the attention of the plaintiffs to the subject, and advised them that the skins should be resalted or tanned and suggested to them that they send them away to be tanned on their account, which they declined to do; that the defendant also proposed to take them to his own storehouse and there treat them. The plaintiffs did not consent to this, but suggested that he pay the debt and do what he pleased with the property. It does not appear that the defendant designated any place other than his storehouse to take it. In July they were, with the consent of the plaintiffs, removed to their storehouse by the defendant, who there sought to improve the condition of the skins and to stay the progress of decay or disintegration, but apparently without much success; and they were finally sold for a small sum. When the attention of the plaintiffs was first called to this condition of the skins if they unreasonably denied to the defendant the opportunity to do that which may have relieved the property from further injury or tended to its preservation to any extent, they would have been chargeable with the consequences which followed. It is quite evident that at that time a considerable portion of the skins was in an irreparable condition, at least such inference is permitted, although it may not have then been so understood by the defendant. And to what extent they afterwards and before the removal to the plaintiffs' warehouse were further affected does not appear. But the plaintiffs were not required to permit the defendant to take them to his own warehouse. This would have been a restoration of the actual possession of the property to him, and as against his creditor or *bona fide* purchasers from him it may have rendered the plaintiffs' security ineffectual. (*Yenni v. McNamee*, 45 N. Y. 614; *Farmers & M. Natl. Bk. v. Lang*, 87 id. 209.) And whether under the circumstances it was the duty of the plaintiffs to take some action for the preservation

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of the property after they were advised of the fact of its deterioration, and whether they were chargeable with negligence in that respect were questions properly submitted to the jury; and there was no error in the modification as made of the request to charge in that respect. The proposition which the defendant asserts in support of his claim is upon the assumption that the plaintiffs had the actual and exclusive possession of the property, and, therefore, assumed and were charged with the duty of exercising care to ascertain its condition and for its protection and preservation from injury from natural inherent causes arising from the situation in which it was in the warehouse where the defendant had so placed it. But the case as presented by the evidence was not necessarily that so assumed by the defense as has been already observed. While the plaintiffs had the right as against the defendant to have the property remain there, the opportunity of the latter to inspect the property and exhibit it for sale at his pleasure was not abridged. And it seems he took occasion to give the skins frequent attention. His interest was such as to naturally and reasonably actuate him to do so. And when occasion required the removal of the property from that warehouse it was taken by him to the plaintiffs' premises where it continued to have his care and supervision no less than before. It cannot as matter of law properly be said that although the defendant who frequently saw them, did not, the plaintiffs ought to have apprehended and by investigation discovered the degenerating process going on at the bottom and in the interior of the mass of skins before it was ascertained by the defendant. In view of the relation actually and practically assumed by the parties to the property and of its place of storage and situation, the court properly refused to direct the verdict as requested, and in submitting questions of fact to the jury charged as favorably to the defendant as he was fairly entitled. None of the exceptions seem to have been well taken.

The judgment should be affirmed.

All concur, except VANN, J., not voting.

Judgment affirmed.

Statement of case.

HERMAN BERRY, Respondent, v. AMERICAN CENTRAL INSURANCE COMPANY of St. Louis, Appellant.

A tenant who has agreed verbally with his landlord to keep the demised premises insured has an insurable interest in the property, and may insure in his own name to the extent of the amount agreed to be insured, and when no amount is named, his interest is the full value.

Defendant issued to plaintiff a policy of insurance upon a building; the legal title thereto was in plaintiff's son. Plaintiff was in possession under a verbal agreement, whereby he was to occupy the premises during his life, and in consideration thereof to keep the building insured, in repair, and to pay the taxes. *Held*, that while the agreement might be, as between plaintiff and his son, void because not in writing, yet plaintiff, while in the unquestioned possession of the property, could not deny his liability, and so was bound to keep the building insured, and, therefore, had an insurable interest.

The policy provided that it would be void if, without notice to the company and permission therefor indorsed on the policy, the interest of the insured was other than absolute ownership. The policy also provided that "no agent has any power to waive any condition of the policy;" and that no notice to, or consent of, any agent of the company shall bind the company until the notice or consent is clearly expressed and indorsed on the policy, signed by the agent. Plaintiff informed defendant's general agents, who issued the policy, that his son had bought the property for him; that he was to have it as a home as long as he lived, and was to insure it. *Held*, that this statement fairly gave notice that plaintiff was not the owner, and that, as part of the consideration for its use and possession, he had agreed to insure it; that this justified a finding that the condition as to title was waived; that the agents, having authority to make contracts without reference to the home office, their power to waive conditions in the policy were co-existent with that of defendant.

The amount of the insurance was \$1,100. A loss having occurred, plaintiff, upon the representations of the defendant's adjuster that the policy was void by reason of the breach of the condition as to title, agreed to accept \$400 in settlement of his claim. He received a draft for that sum upon defendant, drawn by its general agent, payable to his order, and executed a paper canceling the policy, which he delivered to the agent; thereafter he offered to return the draft and demanded full payment of the loss, which was refused. In an action to set aside the compromise and cancellation, and to recover upon the policy, the court found that the settlement was procured by the statement so made by the adjuster, and that plaintiff was entitled to the relief sought. *Held*, no error;

182	49
132	137
122	49
142	387
182	49
149	484

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that there was not simply a mistake, but a surrender of legal rights intentionally induced by false representation as to the law; that this constituted fraud.

Plaintiff offered in his complaint to deliver up the draft, defendant claiming that as no proper or sufficient tender of the draft had been made before suit brought, the court had no power to grant relief. *Held*, untenable; that the offer in the complaint was sufficient.

(Argued January 27, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to set aside a compromise settlement and a cancellation of a policy of insurance against fire and a release thereof, and to recover upon the policy.

The policy insured the plaintiff to the amount of \$875 on buildings and \$225 on personal property. Defendant was to make good all loss or damage, etc., not exceeding the above-named amounts, "nor the interest of the assured in the property," etc. The policy provided that it should be void if "without notice to this company and permission therefor in writing indorsed thereon the interest of the assured be other than the entire, unconditional and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee simple."

It further provided that "no agent has any power to waive any condition of this policy. No notice to, and no consent of, or agreement by any agent of this company shall be binding on this company until such notice, consent or agreement, as the case may be, is clearly expressed and indorsed in writing hereon and signed by such agent."

The legal title to the real property was in the plaintiff's son, and the plaintiff was in possession under a verbal agreement, whereby he was to occupy the property during his life, and in consideration thereof was to keep it insured, in repair, and pay the taxes thereon.

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There was a total loss by fire of the buildings within the life-time of the policy, and a loss on personal property of \$128.20.

Subsequent to the service of proofs of loss plaintiff, upon the representations of defendant's adjuster that the policy was void by reason of the breach of the conditions as to title, agreed to accept \$400 in settlement of his claims, and thereupon received from such adjuster a draft signed by the general agent upon the defendant for such sum, payable to his order and attached to a blank receipt, and which provided "that it would not be paid if detached from the receipt therein referred to."

Upon receiving this draft, plaintiff executed a paper canceling said policy and delivered it to the agent.

Thereafter, being advised that his policy was not void, he offered by letter to return the draft and demanded full payment of his loss, which being refused, he brought the present action.

Further material facts appear in the opinion.

I. N. Ames for appellant. Plaintiff had no insurable interest in the buildings. As to the real estate, it was a wager policy. (1 May on Ins. [3d ed.] §§ 74, 75; *Marshall on Ins.* 104, 116; *Rohrback v. G. F. Ins. Co.*, 62 N. Y. 53; 4 R. S. 2586; *Ruse v. M. B. Ins. Co.*, 23 N. Y. 523.) Plaintiff, when he accepted the policy, became chargeable with knowledge of its contents, and took it subject to its terms. (*Allen v. G. A. Ins. Co.*, 126 N. Y. 6.) Even, if for the sake of argument, the contract between the father and son had given the plaintiff an insurable interest in the buildings, still the learned trial court erred in its measure of damages as to the said buildings. (*Read v. S. Ins. Co.*, 1 Metc. 16; *Turner v. Barnes*, 5 Wend. 541; *Murray v. C. Ins. Co.*, 11 Johns. 302.) The objections and exceptions of the defendant to the evidence given upon the trial to modify, contradict or change the terms of the policy under the pleadings, and all the conversations between the parties to the policy prior to the delivery

Statement of case.

thereof, were merged in the policy. (*Walton v. A. Ins. Co.*, 116 N. Y. 317.) There was no proper or legal tender by the plaintiff to the defendant of the \$400 draft before the action was brought. (*Graham v. Myer*, 99 N. Y. 611; *Gould v. C. C. N. Bank*, 86 id. 75; *Cobb v. Hatfield*, 46 id. 533; *Evans v. Gale*, 17 N. H. 573; *Thayer v. Turner*, 8 Metc. 550; *Kimball v. Cunningham*, 4 Mass. 502.)

Hannibal Smith for respondent. The conditions in the policy as to the unconditional and sole ownership in the assured were waived by the defendant; and the policy took effect as if the conditions were not in the policy. (*Van Schoick v. N. Ins. Co.*, 68 N. Y. 434; *Miaghan v. H. Ins. Co.*, 24 Hun, 58; *Whited v. G. Ins. Co.*, 13 id. 191; 76 N. Y. 415; *Broadhead v. L. Ins. Co.*, 14 Hun, 452; 23 id. 397; *Chase v. P. Ins. Co.*, 14 id. 456; *Bennett v. N. B. Ins. Co.*, 81 N. Y. 273; *Woodruff v. I. Ins. Co.*, 83 id. 133; *Haigh v. C. Ins. Co.*, 92 id. 51; *Couch v. R. G. Ins. Co.*, 25 Hun, 460; *Short v. H. Ins. Co.*, 90 N. Y. 16; *Bennett v. A. Ins. Co.*, 106 id. 243; *Smith v. H. Ins. Co.*, 47 Hun, 30; *Pitney v. G. F. Ins. Co.*, 65 N. Y. 6; *McCabe v. F. B. Ins. Co.*, 14 Hun, 602; *Pelton v. W. Ins. Co.*, 77 N. Y. 605; *Sprague v. H. P. Ins. Co.*, 69 id. 128; *Ellis v. A. C. Ins. Co.*, 50 id. 402; *C. Ins. Co. v. Spranknieble*, 52 Ill. 53; *N. F. Ins. Co. v. Boomer*, Id. 442; *Dohn v. F. J. S. Ins. Co.*, 5 Lans. 275; *Viele v. G. Ins. Co.*, 96 Am. Dec. 83; *Kruger v. W. F. & M. Ins. Co.*, 1 Am. Rep. 42; *Vanderhoer v. A. Ins. Co.*, 46 Hun, 328; *Wood on Fire Ins.* § 86; *Huff v. C. F. Ins. Co.*, 29 Conn. 10; *I. F. Ins. Co. v. Dunham*, 117 Penn. St. 460; *Elliott v. A. M. F. Ins. Co.*, Id. 548.) The plaintiff being in possession of the property under a verbal agreement that he should have the use of it during his natural life on paying taxes upon the same and making improvements thereon, had an interest and title in the property, good as against the world, except the true owner; and in equity his interests would be protected, notwithstanding it was not in writing. (*Wood on Ins.* §§ 257, 266; *Mayor v. B. Ins. Co.*, 41 Barb. 231; 5

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Abb. Ct. App. Dec. 251; *Lawrence v. S. M. Ins. Co.*, 43 Barb. 479; *Redfield v. H. P. Ins. Co.*, 56 N. Y. 354; *Waring v. I. Ins. Co.*, 45 id. 606; *Cone v. N. Ins. Co.*, 60 id. 619; *Cline v. Q. Ins. Co.*, 7 Hun, 267; 69 N. Y. 614; *Creighton v. H. Ins. Co.*, 17 Hun, 78; *Pelton v. W. Ins. Co.*, 13 Hun, 23; 77 N. Y. 605; *Rohrback v. G. F. Ins. Co.*, 62 id. 47; *Herkimer v. Rice*, 27 id. 163; *N. F. O. Co. v. C. Ins. Co.*, 106 id. 535; *Stephenson v. L. & L. Ins. Co.*, 26 Q. B. U. C. 148; 5 Bennett's Ins. Cases, 94; *I. Ins. Co. v. Murray*, 75 Penn. St. 13; 5 Bennett's Ins. Cases, 526.) There can be no objection as to want of notice of loss in this case. (*Pratt v. N. Y. C. Ins. Co.*, 55 N. Y. 595; *Brink v. H. Ins. Co.*, 80 id. 108; *Titus v. G. F. Ins. Co.*, 81 id. 410.) The fraud practiced upon the plaintiff by the defendant's agent, gave the court the right to afford the plaintiff affirmative relief from the unconscionable settlement made. (2 Pom. Eq. Juris. §§ 841, 847, 849; *Cook v. Nathan*, 16 Barb. 342; *Busch v. Busch*, 12 Daly, 476; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Hunt v. Rousmanier*, 8 Wheat. 174; Story's Eq. Juris. § 138; *M. Ins. Co. v. Bowen*, 42 Mich. 10.) The defendant has its principal place of business in St. Louis. The plaintiff brought the draft into court, in fact, and by the complaint and the decree, provided that the draft should be put in the hands of the county clerk, subject to the order of the defendant. These propositions are a full compliance with the conditions necessary to be performed preliminary to bringing the suit. (*Blewett v. Baker*, 58 N. Y. 611; *Hale v. Patton*, 60 id. 233; *Pequeno v. Taylor*, 38 Barb. 375; *Nichols v. Micheals*, 23 N. Y. 264.)

BROWN, J. There was in this case no misrepresentation as to any fact which was material to the plaintiff's right to recover upon the policy. Indeed, there is no evidence but that the adjuster personally acted in entire good faith, and having no knowledge of the information received by the agents as to the title when the insurance was effected, doubtless believed that the policy was void. But any knowledge or information

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which any of the defendant's agents received during the transaction with the plaintiff is by law imputed to it, and assuming that the plaintiff, at the time of effecting the insurance, stated correctly the facts as to the title, the statement made by the adjuster that the policy, by reason of its conditions and the fact that the plaintiff's son was the owner, were, as emanating from the defendant, fraudulent in law and deceitful.

The court found in substance that the settlement and the cancellation of the policy was procured by the statement made to the plaintiff that the policy was void, and that, relying upon such, plaintiff was led into a mistake as to his legal rights thereunder.

The evidence on the subject was that the adjuster read to the plaintiff the clause in the policy declaring that it should be void if the interest of the assured was other than that of sole and unconditional ownership, and told him that he was well acquainted with the law of insurance, and because the property belonged to his son, plaintiff had no right to insure it in his own name, and the policy was, for that reason, void, and nothing could be collected upon it.

The plaintiff was a man of little business experience, although he had education enough to understand the transaction and read the papers which he signed, and he made the settlement voluntarily, without any coercion upon him, but relied upon the representation as to the law governing his case which the defendant falsely made to him.

There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim.

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This clearly constituted fraud and there would be manifest injustice in upholding a settlement under such circumstances. We think the case falls within well settled rules of equitable jurisdiction, and that the decision of the Special Term was right. (2 Pomeroy's Eq. Jurisprudence, §§ 847, 848, 849; Willard's Eq. pp. 68, 69; *Busch v. Busch*, 12 Daly, 476; *Wheeler v. Smith*, 9 How. [U. S.] 55; *Cooke v. Nathan*, 16 Barb. 392; *Boyd v. De LaMontagnie*, 73 N. Y. 498; *Jordan v. Stevens*, 51 Me. 78; *M. M. L. Ins. Co. v. Bowes*, 42 Mich. 19; *Freeman v. Curtis*, 51 Me. 140.)

The appellant does not, however, question the power of the court to grant relief in such a case, and the only point seriously urged upon us in this connection is that the plaintiff made no proper or sufficient tender of the draft to the defendant before bringing suit. The plaintiff offered in his complaint to deliver up the draft, and upon the trial produced it in court, and by the decree it was to be deposited with the clerk and delivered to the defendant or its agent.

It was unnecessary for the plaintiff to do more than he did. In fact he had received nothing from the defendant. Between parties the note of one of them is not property, but a mere promise to pay, which is avoided by rescission of the contract.

The draft which plaintiff held was drawn upon defendant by its own agent. It was of no greater force or value than the defendant's note would have been, and in such a case a tender and surrender upon trial was all that was essential to the plaintiff's right to the relief sought. (*Thurston v. Blanchard*, 22 Pick. 18; *Nichols v. Michael*, 23 N. Y. 264; *Gould v. Cayuga Bank*, 86 id. 75-82.)

But in an equity action to rescind a settlement, the rule invoked by defendant has no application. If the plaintiff had failed on the trial the settlement would have stood and he would have been entitled to retain and use the draft. And it is sufficient in such an action for the plaintiff to offer in his complaint to restore what he has received, and the rights of the parties are then regulated and protected in the judgment.

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(*Allerton v. Allerton*, 50 N. Y. 670; *Vail v. Reynolds*, 118 id. 297-307.)

We come, therefore, to the question whether a recovery upon the policy can be upheld. The first contention of the defendant is that the plaintiff had no insurable interest in the buildings.

The rule is well settled that it is not necessary to support an insurance that the assured should have an interest, legal or equitable, in the property destroyed. It is enough if he is so situated with reference to it that he would be liable to loss if it is destroyed or injured by the peril insured against.

In brief, a person may insure against his liability with reference to a certain property as well as his interest therein. (*Insurance Co. v. Chase*, 5 Wall. 509-513; *Nat. Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535-541; 3 Kent's Com. [6th. ed.] 276.)

The test of insurable interest is whether an injury to the property or its destruction by the peril insured against would involve the assured in pecuniary loss. (Wood on Fire Ins. § 282.)

Thus a common carrier may insure goods intrusted to him to their full value without regard to his liability to the owner. (*Crowley v. Cohen*, 3 B. & Ad. 478; *London & N. W. Ry. Co. v. Glyn*, 1 El. & El. 652.)

So may a warehouseman, although liable to the owner only for his own negligence. (*Waters v. Monarch F. & L. Ass. Co.*, 5 El. & Bl. 870; *Stillwell v. Staples*, 19 N. Y. 401; *DeForest v. Fulton F. Ins. Co.*, 1 Hall, 84.)

So may a charterer of a vessel, who is liable to pay its value in case of loss, or has contracted to insure it against usual risks. (*Oliver v. Greene*, 3 Mass. 133; *Bartlet v. Walter*, 13 id. 267.)

Insurers of a building have an insurable interest therein which they may reinsure. (*N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. 359.)

And a tenant, who has agreed verbally to keep the demised property insured, is liable to the lessor for a breach of that

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agreement, and has an insurable interest in the property to the extent of the amount agreed to be insured. (*Lawrence v. St. Mark's F. Ins. Co.*, 43 Barb. 479.)

Other illustrations of this rule are to be found in *Herbimer v. Rice* (27 N. Y. 163); *Kline v. Q. I. Co.* (7 Hun, 267; 67 N. Y. 614); *Waring v. Indemnity F. Ins. Co.* (45 id. 606); May on Ins. ch. 6; 1 Wood on Fire Ins. ch. 8.

The principle upon which these cases all rest is that there is a possible liability arising out of the peril insured against, and that creates an insurable interest.

Under the contract with his son, the plaintiff had agreed, among other things, to keep the property insured, and this agreement gave him a right to insure the buildings in his own name to their full value. The defendant contends that, as the contract with his son was by parol and hence void, the plaintiff had no interest in or liability towards the insured property. This proposition might have some weight if the insurance was upon the title or interest of the plaintiff as life tenant, or if there had been representations on the part of the plaintiff that such was the interest intended to be insured. But we think it has no application to the case made by the evidence. The plaintiff, while in the unquestioned enjoyment and possession of the property, could not deny his liability under the contract with his son to insure, and under that agreement, so far as is disclosed in this action, would have been liable for the loss of the buildings, if he had failed to insure them.

The defendant, if it had notice of the relation which plaintiff bore to the property, cannot deny the legality of its contract, although it may be that the plaintiff could not have enforced against his son his right to use the property for life had that been denied. The final question is whether the defendant had such notice of the facts as to the title to the property as justified the court in finding that it had waived the conditions heretofore quoted.

The question of waiver was one of fact, and we think the evidence was sufficient to support the conclusion reached.

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There was evidence to the effect that plaintiff informed the agent who issued the policy that his son, who lived in Chicago, had bought the property for him, and he was to have it as a home as long as he lived, and that he was to insure it, keep it in repair and pay the taxes.

This statement fairly gave notice to the agent that the plaintiff was not the owner of the property, and that, as a part of the consideration for its use and possession, he had agreed to insure it.

If the defendant desired further information as to the title, it should have requested it, and not having done so, it must be assumed now to have had notice of such facts as it could with reasonable diligence then have ascertained.

This evidence justified the finding that the conditions of the policy as to title were waived, and this conclusion was not weakened by the fact that in the policy delivered there was a condition that no agent had power to waive any of the conditions of the policy, and no notice to or agreement by any agent would be binding on the defendant unless expressed in writing and indorsed upon the policy and signed by the agent.

The agents who issued the policy were general agents having authority to make contracts without reference to the home office, and their power to waive conditions in the policy was coexistent with that of the company itself. (*Trustees v. Brooklyn Ins. Co.*, 19 N. Y. 305; *Walsh v. Hartford Ins. Co.*, 73 id. 5-9.)

Conditions which enter into the validity of a contract of insurance at its inception may be waived by agents, and are waived if so intended, although they remain in the policy when delivered. (*Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Bennett v. North British & M. Ins. Co.*, 81 id. 273; *Woodruff v. Imperial F. Ins. Co.*, 83 id. 133; *Haight v. Continental Ins. Co.*, 92 id. 51.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

ROBERT DEELEY et al., Respondents, v. JOHN DWIGHT et al.,
Impleaded, etc., Appellants.

132	59
166	390
182	59
75 AD	98

An action to recover damages for the conversion of chattels will not lie to enforce an equitable lien, as against the owner of the legal title, in possession of the property, who has not contracted it to the lienor.

A legal title to property not in existence, actually or potentially, cannot be transferred by way of mortgage.

Such an instrument, however, may be construed by a court of equity as operating by way of present contract to give a lien, which, as between the parties, takes effect, where there are no intervening rights of third persons, when the property comes into existence, and into the ownership of the party executing the instrument.

In an action for the conversion of certain machinery, it appeared that plaintiff manufactured the machinery under a contract with one G., who had contracted to manufacture and deliver the same to defendants, and had received the purchase-price. Before any considerable portion of the machinery was manufactured, G. executed an instrument, in form a chattel mortgage, to one of the plaintiffs upon the machinery then completed and that thereafter to be made, as security for the price agreed to be paid. As the different pieces were delivered to G. he delivered them to defendants, who, before the filing of the mortgage and before they had notice of its existence or of plaintiffs' claim, expended a large sum in setting up the machinery, and in improvements to be used in connection with it. *Held*, the action was not maintainable.

(Argued January 28, 1892; decided March 8, 1892.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made March 6, 1890, which set aside a verdict in favor of defendant directed by the court, and granted a new trial.

This action was brought to recover damages for the conversion of certain machinery, to which plaintiff claimed title under a chattel mortgage executed by Joseph Gandolfo to the plaintiff Robert Deeley to secure the purchase-price. Defendants, who were partners, claimed as purchasers from Gandolfo for value and in good faith.

In the autumn of 1883, Joseph Gandolfo contracted to sell machinery to be manufactured and thereafter delivered to the defendants for \$5,666. In performance of the contract

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Gandolfo furnished additions and performed labor for which the defendants agreed to pay \$557.50, making the full amount of the indebtedness \$6,223.50, which the defendants paid as follows: October 23, 1883, check \$2,250, November 22, 1883, check \$1,500, December 11, 1883, check \$2,473.50.

The machinery was manufactured by the plaintiffs for Gandolfo, and was delivered to him at various dates in February, March, and April, 1884, for which he agreed to pay the plaintiffs \$4,700. As the different pieces of machinery were delivered to Gandolfo he delivered them to the defendants, who set them up in their factory.

February 21, 1884, before much if any of the machinery was manufactured, Gandolfo gave his promissory note due on demand to Robert Deeley one of the plaintiffs for \$4,700, the agreed purchase-price, to secure the payment of which Gandolfo on that day executed and delivered to Robert Deeley a chattel mortgage upon the machinery then manufactured, and that which was afterwards to be made and delivered pursuant to the oral contract theretofore entered into between them. The mortgage was in the usual form and recited that the articles are "now in the possession of the said party of the first part in the building of Messrs. John Dwight & Co. 1st Avenue, between 112th and 113th Sts., in the city of New York."

The mortgage contained the usual clause selling the goods to the mortgagee upon condition, and as security, and that in case default was made in payment, power was given to take and sell the goods. Afterwards \$1,500, was paid on the note and May 13, 1885, the mortgagee indorsed a statement upon the mortgage that there was then due and unpaid thereon \$4,319.75, and on the same day filed it in the office of the register of the city and county of New York. The mortgage had not been previously filed, and the defendants had no notice of its existence nor of the plaintiffs' claim and before it was filed defendants had expended \$5,355.27, in setting it up, in other machinery and improvements to be used in connection with that sought to be recovered.

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A. P. Ketchum for appellants. Dwight was a *bona fide* purchaser within the simple meaning of that term. (*Barnard v. Campbell*, 58 N. Y. 73.)

George P. Hoteling for respondents. Assuming that all or some of the articles mortgaged were not in existence at the time the mortgage was given, it is still a valid mortgage, as it is a purchase-money mortgage; and as the plaintiffs finished the articles from time to time, the mortgage took effect as to each article immediately upon its completion, or at least, upon its delivery, as to any one not a *bona fide* purchaser for value from Gandolfo. (*Kribbs v. Alford*, 120 N. Y. 519; *Ludwig v. Kipp*, 20 Hun, 265; *McCaffrey v. Woodin*, 65 N. Y. 459; *Willets v. Brown*, 42 Hun, 140; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Coates v. Donnell*, 94 id. 168; *Stevens v. Watson*, 4 Abb. Ct. App. Dec. 302; *Coman v. Lakey*, 80 N. Y. 349; *Andrews v. Durant*, 11 id. 35; *Burrows v. Whittaker*, 71 id. 291; *Woods v. Russel*, 5 B. & A. 942.) Gandolfo and the Dwights also, by being in privity with him, are estopped by the warranty of title in the mortgage from claiming that he had no title at the time the mortgage was given. (*Parshall v. Eggert*, 54 N. Y. 18; *Taft v. Munson*, 57 id. 97; *Gardiner v. Suydam*, 7 id. 357; *House v. McCormick*, 57 id. 311; *Judd v. Sukens*, 62 id. 266.) A chattel mortgage is valid without filing as against all persons except creditors having judgments or liens and subsequent purchasers in good faith. (*Van Heusen v. Radcliff*, 17 N. Y. 583; *Thompson v. Van Vechten*, 27 id. 580; *Kennedy v. U. Bank*, 23 Hun, 496; *Button v. Rathbone*, 126 N. Y. 187.) The term "subsequent purchaser in good faith" does not include one who takes in payment of a precedent debt, or one who takes in performance of an executory contract of sale made prior to the acquiring possession or of some evidence of title by the vendor, although the price is paid at the time of the contract. It only includes those who part with value at the time the title or property is transferred or delivered, and on the faith thereof. (*Button v. Rathbone*, 126 N. Y. 187; *Van Heusen v. Rad-*

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Cliff, 17 id. 583; *Thompson v. Van Vechten*, 27 id. 580; *Wood v. Robinson*, 22 id. 564; *Weaver v. Barden*, 49 id. 286; *Barnard v. Campbell*, 65 Barb. 286; 55 N. Y. 456; 58 id. 73; *Voorhees v. Olmstead*, 66 id. 116; *Dusenbery v. Hurlbert*, 59 id. 541; *Kursheedt v. McCune*, 20 Abb. [N. C.] 265.) The defense of estoppel cannot aid the defendants on this appeal for two reasons; first, because as a matter of law the evidence did not establish an estoppel; second, because the evidence, even if sufficient, should have been submitted to the jury, and as it was not, the order granting a new trial was proper. (*Voorhees v. Olmstead*, 66 N. Y. 113; *Knights v. Miffen*, L. R. [5 Q. B.] 660; *McNeil v. N. Bank*, 46 N. Y. 325; *C. Bank v. N. Bank*, 50 id. 575; *Anderson v. Read*, 106 id. 333; *Barnard v. Campbell*, 55 id. 457; *McMasters v. Ins. Co.*, 55 N. Y. 222; *R. Co. v. Rothery*, 107 id. 310.) Where a defense rests solely upon the testimony of a party it should be left to a jury to determine its weight or value. This is especially so when the testimony is contradictory or improbable on any essential point. (*C. Bank v. Diefendorf*, 123 N. Y. 191; *Vosburgh v. Diefendorf*, 119 id. 357; *Joy v. Diefendorf*, 28 N. E. Rep. 602; *Munoz v. Wilson*, 111 N. Y. 295-300; *Elwood v. W. U. T. Co.*, 45 id. 549; *Honegger v. Wettstein*, 94 id. 252-261; *Bagley v. Bowe*, 105 id. 177; *Koehler v. Adler*, 78 id. 287-293; *Benedict v. Williams*, 48 Hun, 123; *Lesser v. Wunder*, 9 Daly, 70.) But the defendants failed to prove, even *prima facie*, their defense as *bona fide* purchasers, or that of estoppel, inasmuch as they did not show that John E. Dwight did not know that Gandolfo, had given a mortgage on it to anyone. The burden was on the defendants to show this affirmatively. (*C. Bank v. Diefendorf*, 123 N. Y. 191; *Seymour v. McKinstry*, 106 id. 230; *Vosburgh v. Diefendorf*, 119 id. 357; *Stevens v. Brennan*, 79 id. 258; *Joy v. Diefendorf*, 28 N. E. Rep. 682; *Button v. Rathbone*, 118 N. Y. 666.) It was not necessary that Dwight should have known that Deeley held the mortgage or who it was; it was sufficient if he knew or suspected that a mortgage had been given. If he did, then it was notice and he should

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have inquired and insisted on knowing all the facts. (*Ellis v. Hermann*, 90 N. Y. 466, 474.) The Dwights were bound under the circumstances to have made some effort to learn the facts, and are chargeable with notice of all that such inquiry would have disclosed. (*Dunn v. Hornbeck*, 72 N. Y. 80, 89; *Pringle v. Phillips*, 5 Sandf. 157; *Parker v. Connor*, 93 N. Y. 124.) If upon any finding warranted by testimony the plaintiffs would have been entitled to recover, the direction of a verdict for defendants was erroneous and a general exception to such ruling was sufficient. (*Trustees v. Kirk*, 68 N. Y. 458-467; *Freckling v. Rolland*, 53 id. 422-426; *Train v. H. P. Co.*, 62 id. 598-604; *Vail v. Reynolds*, 118 id. 297.) Upon an appeal from an order granting a new trial the appellant takes the risk not only of the questions considered by the court below, and upon which they have made the order, but of every other exception appearing upon the record, and every legal question that can be made by the respondent, who may sustain his order upon showing any legal error, whether noticed by the court below or not. (*Caswell v. Hazard*, 121 N. Y. 484; *Mackey v. Lewis*, 73 id. 382; *Noyes v. Wyckoff*, 114 id. 204.)

FOLLETT, Ch. J. An action to recover damages for the conversion of chattels is a strictly legal one which cannot be maintained unless the plaintiff is entitled to the immediate possession of the property, if in existence. Except as provided by statute possession by the lienor of chattels on which the lien is claimed is indispensable to support a common-law lien. One having such a lien can maintain trover if the property is wrongfully taken or withheld from his possession, but such an action will not lie to enforce an equitable lien as against the owner of the legal title who remains in possession of the property and has not contracted it to the lienor. The instrument under which the plaintiff claims to recover is in form a chattel mortgage. Gandolfo, who executed it, assumes to transfer the legal title to the machinery to Robert Deeley, the plaintiff's assignor, subject to be defeated upon the pay-

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ment of \$4,700. But the machinery, not having been then manufactured, Gandolfo had no title to it (*Andrews v. Durant*, 11 N. Y. 35; *Comfort v. Kiersted*, 26 Barb. 472), and the instrument did not vest the legal title of the machinery in Deeley, nor did it create a legal lien upon the property described therein. (*Gardner v. McEwin*, 19 N. Y. 123; *Jones v. Richardson*, 10 Met. 481; *Pettis v. Kellogg*, 7 Cush. 456; *Otis v. Sill*, 8 Barb. 102; *Conderman v. Smith*, 41 id. 404; *Thomas Chat. Mort.* § 137; *Jones Chat. Mort.* § 138.)

We find no case which holds that the legal title to property not in existence actually or potentially can be transferred either by way of sale or mortgage. That an equitable lien may be created on property to be brought into existence is well settled, and an action to foreclose the lien may be maintained. It was said in *Coats v. Donnell* (94 N. Y. 177), "A contract for a lien on property not in *esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence, and where there are no intervening rights of creditors or third persons, seems to be established by several decisions in this court." *Kribbs v. Alford* (120 N. Y. 519), which is relied on by the respondent, is not in conflict but in harmony with these views. It was there said "invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity any more than it does in law. But it construes the instrument as operating by way of present contract to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this state." (*McCaffrey v. Woodin*, 65 N. Y. 459; *Wisner v. Ocumpaugh*, 71 id. 113; *Coats v. Donnell*, 94 id. 168, 177; *Hale v. Omaha Nat. Bank*, 49 id. 626, 632.)

It follows from these views that plaintiffs failed to establish

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a legal title, either as general or special owners, and were not entitled to recover.

The order should be reversed and the judgment entered on the verdict, affirmed, with costs.

All concur.

Order reversed and judgment accordingly.

WALTER MYERS, Respondent, v. ROBERT J. DEAN, Appellant.

In an action to recover for services, alleged to have been performed by plaintiff, as broker in procuring for defendant, at his request, a lease of property belonging to the city of New York, the power to lease which was in the board of commissioners of the sinking fund, the lease to be for the highest rental bid at public auction or by sealed bids after public advertisement (§ 170, chap. 410, Laws of 1882), plaintiff's evidence was to this effect: notices were posted upon the premises that they were to be rented and reference was made therein to the comptroller for information, his purpose being in accordance with custom to procure a satisfactory offer before advertising. Plaintiff having obtained from the comptroller a proposed rental and a diagram, told defendant that he had the property to rent; they went together to see the comptroller and defendant made an offer which was accepted by that officer; defendant signed a memorandum which contained a provision that he "should pay all brokerage." Plaintiff was not employed or invited by the comptroller to procure offers. The amount of plaintiff's commission was stated by him; this defendant agreed to pay if he obtained the lease at his bid which he did. *Held*, that the evidence justified a finding of a consideration sufficient to support defendant's promise; and so, that a motion for a nonsuit was properly denied.

Defendant's evidence was to the effect that plaintiff was not employed by and performed no services for him, and that his agency was in no sense a procuring cause in obtaining the lease. The court charged that if defendant stated to plaintiff before the lease was obtained that if he obtained the lease on his offer he would pay the commissions, plaintiff was entitled to recover. *Held*, error; as without some employment of or the performance of some service by plaintiff, there was no consideration for defendant's promise; and that the question of employment or service was for the jury.

(Argued January 28, 1892; decided March 8, 1892.)

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APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made June 2, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

L. E. Warren for appellant. The plaintiff is not entitled to recover upon the instrument signed by the defendant at the comptroller's office on November 2, 1888. (*Presbyterian Church v. Cooper*, 112 N. Y. 517; *T. T. S. B. Church v. Cornell*, 117 id. 601; *Sweetman v. Prince*, 62 Barb. 256; *Clark v. Richards*, 3 E. D. Smith, 89; *Rogers v. Murray*, 3 Bosw. 357; *Wilkie v. Roosevelt*, 3 Johns. Cas. 210; *Bunten v. Ins. Co.*, 4 Bosw. 254.) The plaintiff did not render any services to the defendant at his request or from which an agreement on his part to pay brokerage could be implied. (*Bartholemew v. Jackson*, 20 Johns. 28; *Livingston v. Ackeson*, 5 Cow. 531; *Griffin v. Potter*, 14 Wend. 209; *Maltby v. Harwood*, 12 Barb. 473; *Williams v. Hutchinson*, 3 N. Y. 312; *McCarthy v. Mayor*, 96 id. 1; *Warren v. R. R. P. Co.*, 31 N. Y. S. R. 628; *Ehle v. Judson*, 24 Wend. 97; *Crasto v. White*, 52 Hun, 473.) There was no consideration for any express promise made by defendant to plaintiff. (*Smith v. Ware*, 13 Johns. 257; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420; *Chilcot v. Trimble*, 13 id. 508; *Ainsley v. Meade*, 3 Lans. 126; 1 Pars. on Cont. 432; *Goulding v. Davidson*, 26 N. Y. 604; *Evans v. Williams*, 60 Barb. 346; *Wheeler v. Billings*, 38 id. 263; *Oscanyon v. Arms Co.*, 103 U. S. 261; *Carey v. W. U. T. Co.*, 20 Abb. [N. C.] 333.) If any promise was made by defendant, plaintiff's testimony shows that it was obtained through such misrepresentation and deceit that no action can be maintained upon it. (*Murray v. Beard*, 102 N. Y. 505.)

P. Q. Eckerson for respondent. If plaintiff rendered service to the lessee by introducing the defendant to the comp-

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troller, which the comptroller testifies was the fact, then plaintiff rendered all the services he was called upon to entitle him to brokerage. (*Smith v. McGovern*, 65 N. Y. 575; *Wyckoff v. Bliss*, 12 Daly, 324; *Sussdorf v. Schmidt*, 55 N. Y. 319.) The questions in this case were for the determination of the jury, and their verdict having been approved by the trial judge and General Term, the Court of Appeals will not interfere therewith. (*Kennedy v. City of Cohoes*, 100 N. Y. 623.) Even though the contract was void and illegal, which we deny, the defendant could not raise such a question upon this trial, as he had not set up such a defense in his answer. (*O'Toole v. Garvin*, 1 Hun, 92; *Milbank v. Jones*, 127 N. Y. 370; Code Civ. Pro. § 500; *May v. Burns*, 13 Abb. [N. C.] 384; *Hall v. U. S. R. Co.*, 30 Hun, 375.)

BRADLEY, J. The action was brought to recover for services alleged to have been performed by the plaintiff as broker for and at the request of the defendant in procuring for him a lease of certain premises in the city of New York, owned by the city. The lease was made of date January 11, 1889, for the term of ten years, at the annual rent of thirty-one thousand dollars, except that the rent for the portion of the term preceding the first of May of that year was at the rate of \$20,000 per annum. The plaintiff claimed and recovered as commissions one per cent of the gross rental sum for the entire term, which recovery, with interest included in it, was \$3,216.49. The testimony given by the parties was in conflict, and the trial court charged the jury that if they believed the defendant's version of the affair the latter was entitled to a verdict.

It is not claimed that the plaintiff procured the execution of the lease to the defendant. He could not do that because that was dependent upon the plaintiff being the highest bidder at the auction sale of the term. The power to lease the property was in the board of commissioners of the sinking fund for the highest rental at public auction or by sealed bids after public advertisement, etc. (L. 1882, ch. 410, § 170.) Notices were posted on the premises that they were to be rented and in the

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notices reference was made to the city comptroller for information on the subject. His purpose in this instance, in accordance with his customary method, was to obtain a satisfactory offer, termed an upset bid, before advertising the term for sale. The plaintiff learning that the premises were to be rented, called upon the comptroller, obtained from him a proposed rental and a diagram of the property, and after having called attention of some others to it and obtained offers from them which were not satisfactory to the comptroller, he called upon the defendant, and the plaintiff's evidence was that he told the defendant he had the property to rent, that he could offer it for \$35,000 per year, and showed him the diagram, that the defendant said he would go and see the comptroller, and did so, and that afterwards, when called upon by the plaintiff, said he had seen him, and arranged with the plaintiff to go with him the next day and see that officer, that they then went there and the comptroller consented to accept the defendant's offer to bid an annual rental of \$31,000, and caused a memorandum in the form of a communication to him subscribed by the plaintiff to the effect that he made such offer, except as to the period preceding the first of May following, for which the rate per annum was \$20,000, and that he would perform in the event he should become the purchaser pursuant to such offer, and for the security of which he deposited a sum of money. In that memorandum was inserted a provision that the defendant "should pay all brokerage." The lease of the premises was thereupon advertised and afterwards sold at public auction to the defendant upon his offer, as no higher bid was made, and the lease was executed accordingly.

It is upon the alleged fact that the lease was procured by the defendant through the services performed for him and in that behalf by the plaintiff, that the latter claimed he was entitled to recover the commission. For the support of that claim the employment of the plaintiff was essential. And he testified that at his interview with the defendant after the latter had seen the comptroller on the subject, and before they were together at his office, he told the defendant that the person

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who should take the lease would have to pay the brokerage, as the city never paid any, that he also informed him that the brokerage was one per cent on gross amount and the defendant said if he got it at his bid he would pay the brokerage; that afterwards, when they were at the comptroller's office at the time the offer of \$31,000 was made and accepted as a bid, the defendant there said he would pay the plaintiff the brokerage, and the latter said it would be one per cent, and requested the comptroller to put it in the memorandum of the offer subscribed by the defendant, and that the provision on the subject before mentioned was inserted in it, and that afterwards when called upon by the plaintiff on the subject of his claim, the defendant told him to make out his bill and he would send him the amount of the claim as soon as he got the lease. He afterwards refused to pay it. This is substantially the evidence upon which the plaintiff relied to support his alleged cause of action. The defendant took exception to the denial of his motion to dismiss the complaint on the grounds that the negotiation with comptroller was necessarily ineffectual to produce any lease or any contract for it, as it could be procured only through a purchase made at public auction by the highest bidder; and that it did not appear that any services of the plaintiff were the procuring cause of the lease to the plaintiff. It is, therefore, urged that there was no consideration to support the promise which the evidence of the plaintiff tended to prove the defendant made to pay him commission or brokerage. The plaintiff was advised that the city would pay none; and it appears by the evidence of the comptroller that the plaintiff was neither employed nor invited by him to produce offers, but, as he expressed it, the plaintiff invited himself, that he distinctly told him "that the city never dealt with brokers; that we had nothing to do with brokers; * * * that it would have to be sold at auction," but that he would nevertheless consider any offers he should present. There was then no claim founded upon any employment in behalf of the city. And in respect to the provision on the subject in the memorandum, the comptroller testified that he wanted it thoroughly understood that

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the city had nothing to do with the brokerage or with brokers, and that if there was any broker's fee it must come from the other parties to the transaction; and, therefore, he made the insertion in the manner he did in the memorandum so there would be no misunderstanding about it. The plaintiff's claim must rest solely upon his employment by the defendant or upon the performance of services for him at his request. When the plaintiff, as he testified, first appeared to the defendant, he assumed to have the premises to rent or negotiate for a demise of them to a lessee whom he should procure to take them. His relation so assumed was apparently that of representative of the owner seeking a lessee in its behalf, and no employment of him by the defendant could be deemed to have resulted from such first interview between them. Intermediate that and the second time when the plaintiff says he called upon the defendant, the latter had seen the comptroller on the subject. Then followed the interview between the parties in which the subject of brokerage was first mentioned. Then, as represented by the plaintiff's evidence, he informed the defendant that the city paid no commissions, suggested that his were one per cent, and that the defendant promised to pay; and that the rate and such promise were repeated the next day at the comptroller's office.

The facts, as represented by the evidence of the plaintiff, must, in the consideration of such motion, be deemed established. And the question arising in that respect is whether they were sufficient to warrant the recovery. While it is true that the comptroller had no power to lease the property, he was a member of the commissioners of the sinking fund, and as such received offers preliminary to advertising the public auction, so as to have assurance of a bid of a sum for which the commissioners would be willing to lease the property if they failed to get any higher offer at the sale. This it seems was a precautionary method of proceeding to avoid the futility which might otherwise result from advertising for and attempting to sell at public auction. It may be assumed that the comptroller in such cases seeks to get as high an offer for the

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upset bid as he can to submit to the commissioners, and that the acceptance of it as to the amount for such purpose is or may be the result of negotiation, and that the person whose offer is accepted has the opportunity to obtain the lease, subject only to the contingency of a bid of higher price than he has proposed to give. In that view there may be some value or benefit to him in judicious negotiation in his behalf in the outset. Although it may be difficult to see in the evidence that the plaintiff did very much by way of accomplishing the result that was reached in the negotiation with the comptroller, the conclusion was permitted that he did bring the defendant and that officer together, and that while the negotiation was pending the defendant treated the plaintiff as in his service and promised to pay him the amount claimed by way of brokerage or commissions in the event the transaction resulted in a lease to him of the property. In that view the defendant's promise was not without consideration for its support. And it follows that the motion to dismiss was properly denied.

Upon the request of the plaintiff's counsel the court charged the jury that if they believed that "Mr. Dean stated to Mr. Myers before the lease was obtained, that if he obtained the lease on his offer he would pay the commission," the plaintiff was entitled to recover. And the defendant excepted. On the assumption that the plaintiff was employed by the defendant or performed any services in the matter for him at his request, the proposition so charged was properly submitted to the jury. But without such employment or the performance by the plaintiff of some service at the request express or implied of the defendant, such promise of the latter would have no consideration for its support, and no liability to pay would be created by it. (*Ehle v. Judson*, 24 Wendell, 97.) Whether any services were performed by the plaintiff for the defendant pursuant to employment by the latter or at his request, was a question of fact for the jury upon conflicting evidence, and could not be assumed as matter of law. If the jury adopted as true in that respect the evidence of the defendant they may have found that the plaintiff was neither employed

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by him nor performed any service or did anything in the matter at his request. It is true that a promise before the lease was obtained to pay him may have been some evidence that any services thereafter performed were pursuant to request or understanding that he should be remunerated by such payment. But the evidence of the defendant was to the effect that the plaintiff performed no services for him at any time in reference to the lease, that the defendant was not by any act of the plaintiff brought into communication with the comptroller on the subject, but that prior to any interview of the plaintiff with the defendant the latter had been in negotiation with that officer, and had made an engagement to meet him the next day at the time he did go to his office, where the plaintiff also appeared without any solicitation of the defendant. The conclusion upon this evidence was permitted that the plaintiff was not only not employed by the defendant, but that his agency was not in any sense a procuring cause of the negotiation for the lease or in obtaining it by the defendant, and if so found by the jury the consequence may have been that the promise to pay was without consideration and ineffectual to charge the defendant. (*McClave v. Paine*, 49 N. Y. 561; *Sussdorf v. Schmidt*, 55 id. 319; *Sibbard v. Bethlehem Iron Co.*, 83 id. 378.) If, however, the proposition in question may be treated as qualified or broadened in its import by other portions of the charge, reference may be made to them in its support. (*Hickebottom v. D., L. & W. R. R. Co.*, 122 N. Y. 91.) But it is not seen that the essential elements omitted in such proposition were necessarily supplied by any instructions to the jury in any part of the charge as made, and for that reason the exception was well taken.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except HAIGHT, J., not sitting.

Judgment reversed.

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HUGH McROBERTS, Respondent, v. HENRY S. BERGMAN et al.,
Appellants.

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143	528

While in an action of ejectment, plaintiff must recover upon the strength of his own title, not upon the weakness of that of defendant, where the former shows a title, better in respect of his right of possession, he is entitled to recover.

In an action of ejectment to recover possession of a salt meadow, and the beach and shore in front thereof lying next the waters of a salt water bay, plaintiff produced in evidence a deed to J., given in 1756, which conveyed two parcels of land; following the description of the last parcel was the following: "And also a little lot of salt meadow * * * to said lot belonging or appertaining." J. died in 1780, and whatever interest he had became vested, under his will, in his son S. S. died in 1845, and whatever title he had vested under his will in his son J. S., who in 1847 executed a deed to W., purporting to convey a piece of land, commonly called "the little salt meadow," bounded by the "sand beach or shore," and also "all the right, title and interest" of the grantor, "which was owned and enjoyed by" S. in his life-time, "in and to the beach shore and waters of the bay in front of the said described premises." The two parcels of land described in the deed to J. were occupied by S. until his death as part of his homestead farm, and his title thereto was not disputed. The salt meadow and beach in question lie near to this farm and were occupied by him in connection with it, his possession was as complete as the character of the land and the uses to which he devoted it rendered practicable, and his ownership was unchallenged. On the trial defendants admitted plaintiff's title to the salt meadow and amended their answer so as simply to deny title to the sand beach. *Held*, that the identity of the salt meadow in question with that described in the deed of 1756 was sufficiently established.

It appeared that the beach and meadow together formed but a single lot, with no artificial boundary between them, bounded by the sea in front and by ditches on each side, and that during living memory the sea had encroached on the land so that the sea is now where the beach once was, and the present beach was once part of the salt meadow. *Held*, that the presumption was that S. died seized of the *locus in quo*, deriving title under the deed to his father; that W. acquired a *prima facie* title under his deed from J. S., which afforded sufficient presumptive evidence of subsequent possession by the grantee, and those holding under him, in the absence of actual proof of a twenty years' adverse possession by a stranger to that title.

The deed of 1756, by its recitals, purported to deduce title from colonial grants made in the previous century. *Held*, that while the recitals were

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not evidence of the facts recited against strangers to this title they were evidence that the grantors and grantee made a claim of title, and so characterized J.'s original entry.

(Argued January 29, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 13, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

The action was ejectment for the recovery of premises in the town of Southfield, on the southerly side of Staten Island, described in the complaint, alleged to contain $8\frac{1}{2}$ acres, consisting of a salt meadow and the beach and shore in front thereof, lying next the waters of the lower bay of New York.

The answer contained a general denial, alleged title in the defendants by adverse possession, and that the plaintiff's alleged title was void for champerty. At the close of the testimony the defendants amended their answer by leave of the court and abandoned claim to the salt meadow, and limited their defense to the sand beach or shore in front thereof, being a strip of land about 940 feet in length along high-water mark, and about 240 feet in width. Upon this strip the defendant, Henry Bergman, had made valuable improvements at an expense of about \$11,500.

Further facts are stated in the opinion.

E. Louis Lowe for appellants. Plaintiff must recover upon the strength of his own title and not upon the weakness of his adversaries. (*Roberts v. Baumgarten*, 110 N. Y. 380.) Plaintiff failed to prove a title. (*Wheeler v. Spinola*, 54 N. Y. 377; *Bliss v. Johnson*, 94 id. 235; *Tracy v. N. & W. R. Co.*, 39 Conn. 382; *Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Price v. Brown*, 101 id. 669.) The charge of the court was erroneous. (Code Civ. Pro. § 378; Laws of 1878, chap. 190; Laws of 1886, chap. 187; *Roe v. Strong*, 119 N. Y. 316.) It was error for the court to charge that all the deeds from

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Keteltas to White and from the Whites to the plaintiff, by reason of the word "beach" therein, purported on their face to convey all the land to high-water mark, including the premises in controversy. (*Trustees, etc., v. Kirk*, 68 N. Y. 457, 463; *People v. Jones*, 112 id. 597, 605.) Assuming, as defendants contend, that the deeds from Keteltas and the Whites conveyed no part of the premises in controversy, and that they gave no color of title thereto, then and in that case it was incumbent upon the plaintiff—if the taking of sand be evidence of possession—to show where upon the beach he took sand for twenty years continuously, and where and in what place he acquired actual possession by such taking. A party without color of title can only recover what he has had actual possession of, and no more. (*Gardner v. Hart*, 1 N. Y. 528; *Pope v. Hanmer*, 74 id. 240; *Thompson v. Burhans*, 79 id. 93; 61 id. 52; 4 R. S. 2453, § 147.) The defendants were not mere intruders. (*Thompson v. Burhans*, 61 N. Y. 52.) The plaintiff is estopped from asserting title or claiming the premises in controversy as against the defendant Bergman. (*Brown v. Bowen*, 30 N. Y. 519; 3 Washb. on Real Prop. 73.) Defendants' exceptions were well taken. (2 Devlin on Deeds, § 1020; *Kellogg v. Kellogg*, 6 Barb. 116; *Bradt v. Church*, 39 Hun, 262.)

Wm. M. Mullen for respondent. The plaintiff's possession from the year 1862 to the year 1875, under the lease from White, who claimed title to the premises in question through the deed from John S. Keteltas as executor of Stephen Keteltas to him, is to be deemed the possession of his said landlord or lessor. (Code Civ. Pro. § 373; *Church v. Schoonmacher*, 115 N. Y. 570; *Becker v. Church*, Id. 562; *Bradt v. Church*, 110 id. 537; *Jackson v. Harrison*, 7 Cow. 323; *Whiting v. Edmunds*, 94 N. Y. 309; *Sands v. Hughes*, 53 id. 293.) The acts of ownership exercised by the plaintiff over the premises in question was sufficient to constitute an adverse possession by the plaintiff to the lands in question. (Code Civ. Pro. §§ 370, 372; *LeFrombois v. Smith*, 8 Cow. 589;

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Corning v. T. I. & N. Foundry, 44 N. Y. 577; *Monroe v. Merchant*, 28 id. 9; *Mayor, etc., v. Carleton*, 113 id. 285; *Town of East Hampton v. Kirk*, 84 id. 215.) In order to constitute a substantial inclosure under the meaning of the statute, it is not necessary that a fence should be erected standing above the ground, but that any other obstacle or barrier which is interposed or constructed around the land sufficient to keep out cattle or other domestic animals, constitutes an inclosure within the meaning of the statutes. (*Wait's Act. & Def.* 329; *Town of East Hampton v. Kirk*, 84 N. Y. 215; *Jackson v. Schoonmacher*, 2 Johns. 229; *Jackson v. Halstead*, 5 Cow. 216; *Becker v. Von Volkenburg*, 29 Barb. 319.) The defendants, by their amendment to the answer, having relinquished all claim to meadow land, and rested their claim solely upon that portion of the property in question, which consisted of sand beach or shore, were not entitled to any part of the premises in question as they existed at the time of the commencement of this action. (*Town of East Hampton v. Kirk*, 84 N. Y. 215; *In re H. & S. R. Co.*, 5 M. & W. 327; 2 Black. Comm. 262; Code Civ. Pro. §§ 370, 373.) The rule that the declarations of a person in possession of land as to its title are admissible evidence against him and all persons claiming under him is well settled. (*Dickinson v. Barton*, 4 Johns. 230; 1 id. 343; 1 Esp. 458; 2 T. R. 53; *Jackson v. Bond*, 4 Johns. 230; *Pitts v. Wilder*, 1 N. Y. 525; *Abeal v. Von Gilder*, 36 id. 513; *Vrooman v. King*, Id. 477; *Norton v. Pettibone*, 7 Conn. 719; *Keaton v. Dimmock*, 46 Barb. 158; *Varick v. Briggs*, 6 Paige, 323; 22 Wend. 543; *Featherly v. Waggoner*, 11 id. 599; *Smith v. Wait*, 4 Barb. 28.) If the defendant Burke had any interest in the premises other than she derived from or through the Stilwell and Tucker deed, it was incumbent upon her to show that interest. (*Bedell v. Shaw*, 59 N. Y. 46; *Pierce v. More*, 114 id. 256; *Bliss v. Johnson*, 94 id. 235.) The deed from Stilwell and Tucker to Burke was absolutely void on the ground of champerty, the plaintiff, McRoberts, being in possession of the premises in question as a lessee of White at the time the deed was delivered.

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(*Becker v. Church*, 115 N. Y. 562; *Church v. Schoonmacher*, 115 id. 570; *Whiting v. Edmunds*, 94 id. 309; *Sands v. Hughes*, 55 id. 293; *Dawley v. Brown*, 79 id. 390; *Fish v. Fish*, 39 Barb. 513; *Ellsworth v. Northrup*, 106 N. Y. 172.) The existence of a fence, presenting a question of fact, was fairly submitted to the jury by the judge in his charge. This question of fact will not be disturbed upon this appeal. (*Cross v. Mowers*, 16 N. Y. S. R. 425; *Cheney v. N. Y. C. & H. R. R. Co.*, 16 Hun, 415; *Seneca Nation v. Hugoboom*, 30 N. Y. S. R. 586.) The deed from Stilwell and Tucker to the defendant Burke being void for champerty, her possession of these lands is not adverse to the title of the plaintiff. (*Dougherty v. Maxwell*, 24 J. & S. 76; *Price v. Brown*, 101 N. Y. 669.) Defendants' exceptions to the admission of evidence was not well taken. (*Sheldon v. Wood*, 2 Bosw. 269; *Bergman v. Jones*, 94 N. Y. 51; *People v. Beach*, 87 id. 508; *Turner v. City of Newburgh*, 109 id. 301; *Ward v. Kilpatrick*, 85 id. 413; *N. Y. S. Co. v. Mayor, etc.*, 109 id. 621; *Carr v. Ilch*, 12 N. Y. S. R. 569; *Denise v. Denise*, 110 N. Y. 562; *Daniel v. Patterson*, 3 id. 47; *Durgen v. Ireland*, 14 id. 322; *R. Seminary v. McDonald*, 34 id. 369; 20 Johns. 347; 5 Barb. 398; *Potter v. Ellice*, 48 N. Y. 321; *Schile v. Brokhaus*, 80 id. 614; *Fills v. Jones*, 2 Abb. Ct. App. Dec. 121; *Wallis v. Randall*, 81 N. Y. 164; *Trustees, etc., v. Kirk*, 84 N. Y. 215; *Corning v. T. I. & N. Factory*, 44 id. 577; *Wheeler v. Spinola*, 54 id. 375; *Thomson v. Burhans*, 61 id. 52; 79 id. 100; *Barnes v. Light*, 116 id. 34; *Roe v. Strong*, 29 N. Y. S. R. 506; *Machin v. Geortner*, 14 Wend. 239; *Jackson v. Woodruff*, 1 Cow. 276; *Munroe v. Merchant*, 28 N. Y. 9, 44; *Van Wyck v. McIntosh*, 14 id. 439; *White v. Madison*, 26 id. 117; *Stowell v. Hazelett*, 66 id. 635; *Cushman v. U. S. L. Ins. Co.*, 70 id. 72; *Tooley v. Bacon*, Id. 34; *Hoffman v. Connor*, 76 id. 121; Code Civ. Pro. § 370; *Argotsinger v. Vines*, 82 N. Y. 398; *Sherman v. Kane*, 86 id. 57; *Swollenham v. Leary*, 18 Hun, 284; *Miller v. S. & R. R. Co.*, 71 N. Y. 380; *Ensign v. McKinney*, 12 Abb. [N. C.] 463; *Enders v. Sternberg*, 1 Keyes, 264; *McKinnon v. Bliss*, 21

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N. Y. 206; *McKinnon v. Barnes*, 66 Barb. 91; *Hooper v. A. W. W. Co.*, 37 Hun, 568; *Hardenbrook v. Laken*, 47 N. Y. 109; *Scofield v. McClellan*, 16 Wall. 331; *Wallace v. Berdell*, 101 N. Y. 13.) The declarations of the defendant Sarah A. Burke are competent evidence against her, and are binding upon her and all those claiming under her. (*Dickinson v. Barton*, 4 Johns. 230; 1 id. 343; 1 Esp. 458; 2 T. R. 53; *Chadwick v. Fonner*, 69 N. Y. 404; *Jackson v. Bond*, 4 Johns. 230; *Pitts v. Wilder*, 1 N. Y. 525; *Embury v. Connor*, 3 id. 512; *Pitts v. Wilder*, 1 id. 525; *Naughton v. Pettibone*, 7 Conn. 319.) The bounding of premises, situated on navigable waters, by the "beach or shore," or "along the shore," carries the title to high-water mark, unless there is something in the conveyance which indicates a contrary intention, and the words "beach or shore," when used in conveying, refer to the "strand" or beach between high and low water. (*Roe v. Strong*, 29 N. Y. S. R. 504; *People ex rel v. Jones*, 112 N. Y. 597, 605; *Trustees, etc., v. Kirk*, 68 id. 459.) The charge in relation to the plaintiff's adverse possession was correct. (*Roe v. Strong*, 107 N. Y. 350.)

LONDON, J. The defendants claimed title by adverse possession, but rested their defense mainly upon the proposition that the plaintiff did not show title in himself, first, because he did not have a paper title covering the sand beach; second, because his grantors were not shown to have been in possession of the premises as owners; third, because the plaintiff's possession, added to that of his grantors, was insufficient either in time or character to establish title by adverse possession, whether founded upon a written instrument or otherwise; fourth, that this alleged paper title was void for champerty.

There was some evidence tending to support the verdict, even if it should be held that under the charge of the learned trial judge it was solely dependent upon a title acquired by the adverse possession of the plaintiff and his grantors not founded upon a written instrument. The charge in this

respect was favorable to the defendants; no valid exception was taken to it; the General Term has affirmed the judgment; the trial court was not asked to hold as a matter of law that the evidence was insufficient to justify a verdict upon that ground, but was simply asked to nonsuit the plaintiff upon several grounds, a motion which was properly denied because the plaintiff might recover upon other grounds. No question of fact upon this point is open to our review, and although the evidence in support of such a title seems to us to be meager, we cannot reverse upon that ground.

The defense of champerty was plainly destitute of merit. The charge of the trial court was equally favorable to the defendants, and no exception is presented upon this branch of the case which avails to reverse the judgment.

In his main charge the learned trial judge submitted the case to the jury upon the sufficiency of the evidence to establish title in the plaintiff by adverse possession exclusive of a claim of title founded upon a written instrument, and also upon the sufficiency of the evidence to sustain the defense of the alleged invalidity of the plaintiff's paper title because of champerty.

The plaintiff claimed title under deeds of the *locus in quo* given him by the widow and heirs of William H. White in 1875. He gave evidence, which we shall presently consider, tending to show that his grantors had title. The defendants relied upon a deed given to the defendant Sarah A. Burke by Ann Stillwell and Joseph Tucker in 1873, purporting to convey a portion of the premises described in the complaint, and they attempted to prove that at the date of the deed to plaintiff she was in possession of the premises, claiming and holding them adversely under the deed to her. This was the basis of the defense of champerty. The evidence disclosed its fictitious character; it was, as already stated, disallowed by the jury; we refer to it to show that notwithstanding the limitations of the main charge of the learned judge, the fact that the plaintiff's claim of title was founded upon a written instrument, and that the defense was directed to the impeachment of title

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thus founded, was present to the minds of the jury throughout the trial. Two of the defendants' requests to charge were addressed to the effect of the description contained in the plaintiff's deed, and a third request was addressed to its champertous character.

The court refused to charge as requested by the defendants' counsel that the description contained in the deed to the plaintiff did not include the sandy flat above high-water mark, that is, the *locus in quo*.

The court, at the request of plaintiff's counsel, then charged that said description did not include the land to high-water mark. The defendants' counsel excepted to both refusal and charge. The defendants' counsel requested the court to charge that the plaintiff under his deeds is not entitled to recover 6⁸⁸/₁₀₀ acres, but only 5 acres, 1 rood and 6 perches. This the court refused, and defendants' counsel excepted. Since the court had in effect instructed the jury that they could not find a verdict for the plaintiff upon his alleged paper title, if the defendants then by their requests induced the court to give it a construction and thus lead the jury to suppose that they also could consider it, this implied change in the instruction of the court would be of the defendants' procurement, and not a ground of reversal of the judgment against them. Nevertheless, the General Term, as its opinion states, held that the plaintiff proved his paper title to be good. It may be that the jury placed their verdict upon that ground. The counsel for the respective parties invite us to examine the question. We, therefore, have examined the evidence adduced in support of it. The result is the conclusion that the plaintiff did prove a clear *prima facie* title to the *locus in quo*, that apart from the evidence bearing upon the defense of champerty, which the jury properly disposed of, that title was in no way impeached.

In 1875, the plaintiff obtained deeds of the *locus in quo* from the widow and heirs of William H. White. John S. Keteltas conveyed the premises to White in 1847. John S. Keteltas, under the will of his father, Stephen Keteltas, who died in 1845, obtained whatever title Stephen had in his life-

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time. Stephen was the son of Captain John Keteltas, who died in 1780, and whatever title Captain John had in his life-time became vested upon his death in Stephen.

The plaintiff read in evidence a deed given in 1756 to Captain John Keteltas by the executors of the will of Jacob Berge, of two parcels of land, containing respectively 81 acres and 40 acres; following the description of the 40 acres, the description continued: "And also a little lot of salt meadow at Eagle's Nest point on the west side of Peter Nowll's land, to the said lot of land belonging or appertaining."

The deed of 1847 from John S. Keteltas to William H. White purports to convey a piece of land commonly called "the little salt meadow," in the town of Southfield, "Bounded northeasterly by salt meadow of Peter Jacobson; northwesterly by the water course known as New creek; southwesterly by salt meadow land of J. L. Flake; southeasterly by sand beach or shore, containing five acres, one rood and six perches as surveyed in October, 1846, by C. H. Blood. And also all the right, title and interest of the party of the first part which he now has or ever had, and which was owned and enjoyed by Stephen Keteltas, deceased, during his life-time, of, in and to the beach shore and waters of the bay in front of the said described premises hereby to be conveyed."

Stephen Keteltas died in 1845 seized of the 81 and 40 acres described in the deed of 1756 to his father. They composed part of the homestead farm upon which he always resided. The salt meadow and beach described in the complaint and in the deed of 1847 to White, lie near to this farm and were used in connection with it.

The salt meadow mentioned in the deed of 1756 is identified with the *locus in quo*, if the words of this description, "to the said lot of land belonging or appertaining," refer to the lot of 40 acres immediately theretofore described in the same deed, as they probably do. But the possession of Stephen Keteltas of the salt meadow and beach in front, as well as of the adjacent 81 and 40 acres, dates from the earliest memory of witnesses, was as complete as the character of the land, and the

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uses to which he chose to devote it rendered practicable, and was of unchallenged ownership. His title to the 81 and 40 acres has never been questioned; upon the trial the defendants disclaimed all denial of the plaintiff's title to the salt meadow, and only insisted upon their denial as to the sand beach. At the close of the testimony, they amended their answer accordingly. The identification of the salt meadow described in the deed of 1847 with that described in the deed of 1756 is thus partly conceded, is substantially established, and is the more conclusive since there is no evidence tending to show the practical location of any other salt meadow as answering the calls of the earlier deed. The evidence shows that Stephen Keteltas had possession of both beach and meadow.

Together they formed a single lot, bounded by the sea in front, by a creek in the rear, and by a ditch on each side about three feet in depth. Between the meadow and the beach there was no artificial boundary. The sea during living memory has been encroaching upon the land and witnesses testified that where the beach once was the sea now is, and that what was once part of the salt meadow is now the sand beach. The boundary ditches along the meadow land were open and well defined. They extended in a straight line across the beach to the sea, but on the beach the shifting sand usually filled them, and Stephen Keteltas occasionally reopened them. Such ditches are the customary boundaries of such lands upon the island. Stephen Keteltas cut the grass upon the salt meadow every year, and used the beach for fishing both for food fish, for the market, and for fertilizing purposes. He had stakes and poles driven there and out into the water to support his fish nets. Occasionally trespassers came upon the beach for sand and he forbade their taking it and caused them to go elsewhere. Within the case of *Roe v. Strong* (119 N. Y. 316), these acts of ownership must, under the circumstances, be referred to the exercise of the right purporting to be granted by the deed of 1756, and not to any usurpation. The presumption is that these acts were acts of possession under that deed, and in the absence of any opposing evidence, that Stephen

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Keteltas' possession was the continuation of the like possession of his father under the same title from its date in 1756. (*Jackson ex dem. v. McCall*, 10 Johns. 377.)

There is no evidence tending to rebut this presumption. The defendants insist that the deed of 1847 to White does in terms convey the salt meadow, but does not in terms convey the beach, but only all the right, title and interest of the grantor John S. Keteltas and such as his father had therein.

A grant of a salt meadow separated from the sea only by a beach formed by the sand thrown by the waves upon the meadow itself, ought not, in the absence of evidence of the public reservation or of a hostile grant to another, to be construed, to use the words of the opinion in the case cited, "to cut him (the grantee) off from access to the water over his own land."

The word beach denotes land washed by the sea, and in the absence of qualifying words, a boundary by the ocean beach extends to high-water mark. (*Trustees of East Hampton v. Kirk*, 68 N. Y. 459; *People ex rel. Burnham v. Jones*, 112 id. 605.)

The practical location of the lot within the boundary ditches extending to high-water mark is not inconsistent with the language of the description of the salt meadow in the deed of 1756. The usage of parties under an ancient grant aids in construing its obscure terms. (*Trustees of Brookhaven v. Strong*, 60 N. Y. 56-72.) The additional words of the deed of 1847, "of all the right title of the party of the first part in and to the shore and water of the bay in front of said described premises," are satisfied by referring them to whatever rights the grantor intended to convey below high-water mark.

The presumption is that when Stephen Keteltas died in 1845, he was seized of the *locus in quo* as owner deriving title under the deed given to his father in 1756. His possession was peaceable, exclusive, notorious and unchallenged; it ascended beyond present memory, and was referable to the deed of 1756. It is not shown to be referable to any other

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source. He had at least *prima facie* title. (*Mayor of N. Y. v. Carleton*, 113 N. Y. 284.) His son John S. Keteltas, succeeding to his title and possession, conveyed to William H. White in 1847. White thus acquired a *prima facie* title. (*Stevens v. Hauser*, 39 N. Y. 302.) Such a deed suffices if not overcome. It affords sufficient presumptive evidence of the subsequent possession of the grantee and those holding under or through him, unless actual proof of an adverse possession for twenty years be made. (Code C. P. § 308; *Thompson v. Burhans*, 79 N. Y. 99; *Bliss v. Johnson*, 94 id. 235.) No such proof was made.

The plaintiff must recover upon the strength of his own title, not upon the weakness of that of the defendant. But he measures his title with that of the defendant, and if it is better in respect of his right of possession, he prevails because of its sufficient strength. (*Dunham v. Townshend*, 118 N. Y. 281; *Carleton v. Darcy*, 90 id. 566; *Thompson v. Burhans*, *supra*; *Clute v. Voris*, 31 Barb. 511; *Jackson ex dem. v. Hubble*, 1 Cow. 613; *Onderdonk v. Lord*, Hill & Denio, 129; *Whitney v. Wright*, 15 Wend. 171; *Hunter v. Starin*, 26 Hun, 529.)

Upon the facts already stated the plaintiff had the better title in respect of the right of possession.

The plaintiff himself, as tenant under White from 1863 to 1875, and as owner from 1875 to 1885, took sand from the beach and sold it to the extent of about 250 sloop loads each year. The business was continuous throughout the year. He also disposed of the grass upon the salt meadow, either cutting it himself or permitting others to do so. This possession was open, notorious and, except as improperly resisted by the defendant Sarah A. Burke, was exclusive. Thus there was no abandonment for twenty years of the possession and dominion of the premises under the title presumed to have originated in 1756, but it was practically continuous during living memory. It is proper to add that the deed of 1756 by its recitals purports to deduce title from colonial grants made in the previous century. While these recitals are not evidence against strangers to this title of the facts recited (*Hardenburgh v.*

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Lakin, 47 N. Y. 109), they are evidence that the grantors and grantee in the deed of 1756 made a claim of title, and they thus characterize Captain Keteltas' original entry.

There are no other exceptions which require discussion.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed. _____

ELIZABETH W. ALDRICH, Appellant, v. MARY E. BAILEY,
Respondent.

182	85
155	880
182	85
75	AD:886

Assuming that a deed executed by an insane person is not voidable merely, but absolutely void, to establish its invalidity, it must appear that the grantor was, at the time he executed it, wholly, absolutely and completely unable to understand or comprehend the nature of the transaction. The parties entered into a contract by which plaintiff agreed to sell and defendant to purchase a certain lot in the city of New York; the latter refused to perform the contract because of the filing of a *lis pendens* a few days before the making of the contract, in an action to have certain deeds and other instruments affecting the title to the block of which the lot formed a part, declared void. Neither the plaintiff here nor her grantor were made parties to that action. The complaint therein alleged that P., the former owner of the block, when he, by reason of extreme old age, was "mentally weak, incompetent and unsound of mind, incapable of attending to business personally, and incapable and incompetent to understand and comprehend properly the nature of a business transaction," and when entirely under the control of S., his agent, through force and fraud practiced upon him by S., who was bribed thereto by the defendant, acting in pursuance of a fraudulent scheme and conspiracy entered into between them to obtain title to the property, caused and influenced P. to make a contract agreeing to convey the property in question to E., one of the defendants, in exchange for other real estate, and subsequently procured P. to execute such a conveyance, which contract and conveyance was in fraud of the rights of plaintiff in that action as heir at law and legatee of P. *Held*, that the averments of the complaint were not sufficient to justify a finding that P. was insane when he executed the contract and deed, but that the gravamen of the action was fraud; that, as it was conceded that plaintiff here took title to the lot in question in good faith, paying a full consideration, his title was not affected by the fraud (2 R. S. 137, § 5), and that plaintiff was entitled to a judgment for specific performance.

(Argued February 1, 1892; decided March 8, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of October, 1889, on a case submitted pursuant to section 1279 of the Code of Civil Procedure, which relieved the defendant from performing a contract to purchase certain real estate.

The facts, so far as material, are stated in the opinion.

Geo. Putnam Smith for appellant. The Supreme Court erred in supposing that the conveyance to Noble was thereby rendered a nullity as against Mrs. Aldrich. She having purchased the land in question in good faith and without notice of any claim on the part of Paine or his heirs that the transaction whereby he parted with the land had been inequitable, her title was unaffected by such claim. (*Bumpus v. Platner*, 1 Johns. Ch. 213; *Griffith v. Griffith*, 9 Paige, 315; *Simson v. Bank of Commerce*, 43 Hun, 156; *Bradley v. Luce*, 99 Ill. 234; *Wade on Notice*, § 62; 1 *Story's Eq.* §§ 381, 434; *Peck v. Arihart*, 95 Ill. 113; *Valentine v. Lunt*, 115 N. Y. 496.) William Paine's claim to and consequent cloud upon the title of the land now owned by Mr. Aldrich was limited and restricted by the form of his action. (*Valentine v. Lunt*, 115 N. Y. 505.)

E. H. Landon and *Wm. D. Page* for respondent. The vendor must be able to convey a good marketable title, or he cannot enforce his contract. (*Fry on Spec. Perf.* §§ 573, 576, 579, 583, 585; *Pom. on Cont.* §§ 198, 202, 205; *Waterman on Spec. Perf.* §§ 411, 412, 415; *Moore v. Williams*, 115 N. Y. 592; *Fleming v. Burnham*, 100 id. 10; *Schrivver v. Schriver*, 86 id. 584, 585; *Schulze v. Rose*, 65 How. Pr. 75; *B. P. Comrs. v. Armstrong*, 45 N. Y. 234, 248; *Swayne v. Lyon*, 67 Penn. St. 436.) Plaintiff's title is doubtful and dangerous. An action to procure the annulment of a deed through which plaintiff derives title is pending. Although this plaintiff and defendant have not been made parties to that action, they may be brought in at any time by an amend-

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ment to the proceedings, or a subsequent action may be brought against them. The court will not impose upon this defendant the risk of an unfavorable decision in that action, nor the possibility of being embroiled in litigation. (*Van Deusen v. Sweet*, 51 N. Y. 383; *Newhouse v. Goodwin*, 17 Barb. 236; *Alston v. Jones*, Id. 276, 288; *Comstock v. Comstock*, 57 id. 453; *Hughes v. Jones*, 116 N. Y. 73; *Johnson v. Stone*, 35 Hun, 383; *Hicks v. Marshall*, 8 id. 328; *M. L. Ins. Co. v. Hunt*, 79 N. Y. 541; *Riggs v. A. T. Society*, 84 id. 335; *Sprague v. Duel*, 11 Paige, 480; *Ingraham v. Baldwin*, 9 N. Y. 45; *Canfield v. Fairbanks*, 63 Barb. 465.)

HAIGHT, J. On June 11, 1889, the plaintiff entered into a contract with the defendant for a sale of a lot on 63d street, running through to 64th street, on Eleventh avenue, in the city of New York. The defendant now refuses to accept a deed from the plaintiff and to pay therefor for the reason that on June 3, 1889, a notice of *lis pendens* was filed in the office of the clerk of the city and county of New York in an action in the Supreme Court wherein William Paine is plaintiff and William Noble et al. are defendants, the object of which, as stated in the notice, is to have certain deeds, conveyances and other instruments affecting the title to the block, of which the plaintiff's lands form a part, declared null and void, etc. Neither the plaintiff nor her grantor were made parties to that action. John Paine was formerly the owner of the block in controversy and conveyed the same to Elizabeth Noble.

The General Term held that under the complaint filed in that action it may be found that Paine was insane at the time he executed the deed to Noble, and if he was his deed was absolutely void and no title would pass, under the authority of *Van Deusen v. Sweet* (51 N. Y. 378). Assuming for the purposes of this case that the rule is there correctly stated, and that a deed would be not merely voidable, but absolutely void when executed by an insane person, yet under the rule in that case a deed is absolutely void only when it appears that the person executing it was at the time so deprived of his mental

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faculties as to be wholly, absolutely and completely unable to understand or comprehend the nature of the transaction. It consequently becomes necessary to examine the complaint in that action and determine whether such relief could be granted thereunder. It alleges that "on or about May 28, 1885, and for two years and more prior thereto, said Paine, by reason of his extreme old age, physical infirmities and other causes was mentally weak, incompetent, unsound of mind, incapable of attending to business personally and incapable and incompetent to understand and comprehend properly the nature of a business transaction, was entirely under the complete influence and control of those composing his own household, and particularly of one Sears, his agent, and was physically incompetent and incapable of resisting successfully any disposition of his property that might be recommended, requested or required of him by said Sears and other members of his household, and that these facts were known to said defendants Noble."

The complaint further alleges that through force, fraud and undue influence exercised and practiced upon Paine by Sears, his agent, who was induced to and did so practice the said force, fraud and undue influence by reason of large sums of money wrongfully and fraudulently offered to him by William Noble acting for himself and the defendant Elizabeth Noble, the said Sears caused and influenced the said Paine to make a contract in writing whereby it was agreed that Paine would convey to Elizabeth Noble the property in question in exchange for other property situate upon 57th street and Seventh Avenue in the city of New York, and that in further pursuance of said fraudulent scheme and conspiracy entered into between said William Noble acting for himself and said Elizabeth Noble, and Cyrus A. Sears, a deed thereof was subsequently procured to be executed by Paine, by which the property in question was conveyed to Elizabeth Noble under the provisions of the aforesaid contract; that the said contract and conveyances were made in fraud of the rights of plaintiff as heir at law and legatee of said Paine, who was at the time of the commencement of that action deceased.

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It will be observed that whilst the allegations of the complaint are to the effect that Paine was of extreme old age, had physical infirmities, and was mentally weak and incapable of attending to business *personally*, and was incompetent to understand and comprehend *properly* the nature of a business transaction; there is no allegation that he was insane, or wholly, absolutely and completely incompetent to understand and comprehend the nature of the transaction complained of. A person, we apprehend, may be of old age and mentally weak, and still be able to understand and comprehend the meaning of a deed or the transfer of property. He may have physical infirmities to such an extent as to be unable to transact business personally, and may have to have others act for him, and still he may possess the requisite mind and judgment to transact the business. The strongest and most significant expression used in the allegations of the complaint is that he was of unsound mind. But this was used in connection with the charge of his inability to transact his business *personally* or to understand and comprehend *properly* the nature of the transaction. No allegation appears as to the extent to which the mind was unsound, or as to whether it was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction. The other allegations of the complaint to which we have referred are those of fraud and conspiracy on the part of the persons named, and to our mind the allegations of physical infirmities, mental weakness, etc., are only made in aid of those of the fraud, conspiracy and undue influence charged.

This view appears to us to be sustained by the case of *Valentine v. Lunt* (115 N. Y. 496). In that action the plaintiff, as heir at law of Mrs. Valentine, sought to set aside a deed of certain premises from her to one Richardt, and also certain mortgages executed thereon by him to Susan A. Austin and Elizabeth H. Lunt. In that case the question arose upon a demurrer. It was alleged in the complaint that Richardt was employed by Mrs. Valentine in her life-time as her physician; that soon after his employment he entered upon illicit

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relations with her and obtained control over her mind and property; that thereupon a great change came over her; she compelled her relations to leave her home and refused to see them or her former friends, and remained completely excluded to everyone except Richardt; that on or about January 7, 1886, she being of unsound mind and incompetent to manage herself or her affairs in consequence of the influence exerted over her by Richardt, he fraudulently taking advantage thereof, obtained from her a deed of her real estate; that he subsequently mortgaged the same to Susan A. Austin for \$12,000, and Elizabeth H. Lunt for \$9,000; that they received the mortgages and made the loans thereon of the amount stated in good faith, without notice of the mental condition of Mrs. Valentine, or of the fraud practiced upon and the undue influence exercised over her by Richardt. It was held that the complaint did not allege that Mrs. Valentine executed the deed to Richardt while insane, and that the mortgagees were entitled to protection.

It consequently appears to us that the complaint in this action is based upon fraud. It is conceded that the plaintiff took title to the lands in question in good faith, paying three hundred thousand dollars therefor, and under the statute in reference to fraudulent conveyance of lands it is provided that the statute shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. (2 R. S. 137, § 5.)

The judgment of the General Term should be reversed and judgment ordered in favor of the plaintiff for the specific performance of the contract in question, with costs.

All concur.

Judgment accordingly

Statement of case.

ALICE M. ALLAN, Respondent, v. THE STATE STEAMSHIP COMPANY (Limited), Appellant.

By the statute of Great Britain, known as the "Passengers' Act 1855" every passenger ship is required to carry a duly qualified medical practitioner and its owner or charterer is required to provide for the use of its passengers a supply of proper and necessary medicines for their medical treatment during the voyage, properly packed and placed under the charge of a medical practitioner "to be used at his discretion." In an action to recover damages against a corporation of Great Britain for injuries alleged to have been sustained by plaintiff, a passenger on one of its steamers, alleged to have resulted from taking calomel furnished by the steamer's physician in response to a request for "quinine," it appeared that defendant issued a prospectus to advertise its line, which contained a statement that an experienced surgeon was carried on board each ship and that all medicines were supplied gratis. *Held*, that defendant assumed no duty or liability beyond those imposed by the statute, *i. e.*, to employ a duly qualified physician, to provide a supply of suitable and necessary medicines, properly packed and labeled and to provide a proper place in which to keep them; and that, having complied with these requirements, for errors and mistakes on the part of the physician thereafter, it was not responsible.

It appeared that in the outset of the voyage the medicines were inspected, as required by the statute, by the medical examiner at the port from whence the steamer sailed and they were then properly packed and labeled. Plaintiff produced evidence to the effect that on the evening when she applied for the medicine the "surgery" where the medicines were kept was in disorder and confusion, the bottles being out of place, and the trial court left it to the jury to determine whether the condition of the "surgery" was such as to show want of ordinary care on the part of defendant in providing and properly labeling medicines or left them open so that a mistake was likely to occur. *Held*, error; that the evidence of confusion and disorder after the steamer went to sea and after the medicines were put in charge of the physician, did not justify a finding of negligence on the part of defendant.

Van Wyck v. Allen (69 N. Y. 62) and *Thomas v. Winchester* (6 N. Y. 397), distinguished.

(Argued February 1, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor

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of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial, and also appeal from order of said General Term, made May 12, 1890, which affirmed an order denying a motion to dismiss the complaint.

This action was brought to recover for injuries alleged to have been sustained by the plaintiff upon a voyage from Glasgow to New York on the steamer "State of Georgia," being the result of taking a dose of calomel which was furnished to her by the physician on board said steamer in response to a request for five grains of "quinine."

The material facts appear in the opinion.

Wm. D. Guthrie for appellant. Defendant was not liable for any mistake or act of carelessness or negligence on the part of the surgeon. (*Laubheim v. D. N. S. Co.*, 107 N. Y. 228; *Secord v. S. P. & M. R. Co.*, 18 Fed. Rep. 221; *O'Brien v. C. S. S. Co.*, 28 N. E. Rep. 266.) The English Passenger Act of 1855, provides that the medicines, etc., shall be "placed under the charge of the medical practitioner, * * * to be used at his discretion." The defendant could not legally disregard this provision. The prospectus, therefore, if embodied in the contract of carriage, must be read in connection with the statute which regulated the subject-matter. (2 Pars. on Cont. 500; *Van Schoonhoven v. Curley*, 86 N. Y. 187; *Yates v. People*, 32 id. 509; *Erschine v. Davis*, 25 Ill. 251.) Evidence of confusion and disorder in the surgery on the twenty-seventh of August, twenty-four hours after the vessel had left Glasgow, had no tendency whatever to show that there was any disorder or confusion when the vessel left the home port or any confusion or disorder of sufficient standing to have raised a presumption of notice to the principal. (*Village of Port Jervis v. F. N. Bank*, 96 N. Y. 550; Penal Code § 404; *Heaney v. L. I. R. R. Co.*, 112 N. Y. 122; *Toomey v. L. B. & S. C. R. Co.*, 3 C. B. [N. S.] 146; *Lafflin v. B. & S. W. R. R. Co.*, 106 N. Y. 136; *Loftus v. U. F. Co.*, 84 id. 455; *Dongan v. C. T. Co.*, 56 id. 1; *Bowen v. N. Y. C. & H. R. R. Co.*, 18 id. 408; *Mundeville v. Reynolds*,

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68 id. 528.) Conceding for the sake of argument, that there was disorder in the surgery for which the defendant was responsible, the complaint should, nevertheless, have been dismissed, because there was no evidence tending to show that this condition of the surgery caused the injury. (*Dobbins v. Brown*, 119 N. Y. 118; *Searles v. M. R. Co.*, 101 id. 661; *Taylor v. City of Yonkers*, 105 id. 202.) Having once objected to evidence as to the surgeon's condition and behavior, it was not necessary to repeat the objection to the same class of testimony, and its reception was error. (*Sherman v. D., L. & W. R. R. Co.*, 106 N. Y. 542, 547; *Church v. Howard*, 79 id. 415, 421; *Dilleber v. H. L. Ins. Co.*, 69 id. 256, 260; *Anderson v. R., W. & O. R. R. Co.*, 54 id. 334; *Arthur v. Griswold*, 55 id. 400; *Taber v. Van Tassel*, 86 id. 642; *Erben v. Lorillard*, 19 id. 299.) The plaintiff could not recover any special damages. (*Uransky v. D. D., E. B. & B. R. R. Co.*, 118 N. Y. 304; *Gunib v. T. T. S. R. Co.*, 114 id. 411; *Baldwin v. W. R. R. Co.*, 4 Gray, 333; *Taylor v. Town of Monroe*, 43 Conn. 36.)

M. L. Towns for respondent. It being conceded that some measure of care was required, the rule of the court requiring only ordinary care was favorable to defendant. (*Thomas v. Winchester*, 6 N. Y. 397; *Van Wyck v. Allen*, 69 id. 52, *Horn v. Meakin*, 115 Mass. 326; *Treadwell v. Whittier*, 80 Cal. 575.

BROWN, J. The learned counsel for the respondent contends that when the plaintiff applied for quinine she had a right to rely upon receiving that medicine, and if she was given anything else the defendant was liable for the injuries sustained, and that mistake upon the part of the physician having charge of the ship's medicines was not a defense.

Van Wyck v. Allen (69 N. Y. 62), and *Thomas v. Winchester* (6 id. 397), are the authorities cited in support of that proposition.

The first case was an action upon contract for breach of an implied warranty. The main question there decided related

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to the rule of damages. The case has no application to an action for a wrong which has its foundation in the violation of a duty entirely outside of and beyond the stipulations of the contract. *Thomas v. Winchester* was decided upon the negligence of the defendant. The trial court charged the jury that "if the defendant was guilty of negligence in putting up and vending the extracts in question, the plaintiff was entitled to recover," and this court held that the liability of the defendant did not arise out of any contract or direct privity between him and the plaintiff, but out of the duty imposed upon him to avoid acts in their nature dangerous to the lives of others. And in carelessly labeling a deadly poison as a harmless medicine and sending it so labeled into the market, the court found the negligence upon which a recovery was sustained.

But whether the druggist, who made the immediate sale of the poison to the plaintiff, would have been liable to her, or whether he was justified in selling the article upon the faith of the defendant's label, was not in that case decided.

That precise question was decided, however, in *Brown v. Marshall* (47 Mich. 576) and in *Beckwith v. Oatman* (43 Hun, 265).

In both of these cases a recovery was permitted by the trial courts upon proof of the fact of a sale of poison to a person who called for a harmless drug, and the question of negligence was withdrawn from the consideration of the jury over the defendant's objection and exception.

In both cases the exception was sustained, the appellate courts holding that a failure on the part of the druggist or his clerk to exercise due care and skill must be proved.

We quote with approval from the opinion of Judge COOLEY in the Michigan case: "The question is whether the delivery at a drug store of a deleterious drug to one who calls for one that is harmless, and a damage resulting therefrom, of themselves, give a right of action even though there may have been no intentional wrong and the jury may believe there is no negligence. That such an error might occur without fault on the part of the druggist or his clerk, is readily supposable. He

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might have bought his drugs from a reputable dealer, in whose warehouse they have been tampered with for the purpose of mischief. It is easy to suggest accidents after they come to his own possession, or wrongs by others, of which he would be ignorant and against which a high degree of care would not give perfect protection. But how misfortune occurs is unimportant if, under all circumstances, the fact of occurrence is attributable to him as a legal fault. The case is one in which a high degree of care may justly be required. * * * It is proper and reasonable that the care required shall be proportionate to the danger involved. But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred."

No case is cited which conflicts with the rule thus stated, and I think no authority to the contrary exists in this state.

The rule of liability applicable to a druggist in cases of this character is the same as that which governs the liability of professional persons whose work requires special knowledge or skill, and a person is not legally responsible for any unintentional consequential injury resulting from a lawful act when the failure to exercise due and proper care cannot be imputed to him, and the burden of proving such lack of care, when the act is lawful, is upon the plaintiff. (*Brown v. Marshall, supra*; *Thomas v. Winchester, supra*; *Beckwith v. Oatman, supra*; *Losee v. Buchanan*, 51 N. Y. 476-488; *Carpenter v. Blake*, 75 id. 12; *Morris v. Platt*, 32 Conn. 75; *Simonds v. Henry*, 39 Me. 155; *Fleet v. Hollenkemp*, 13 B. Mon. [Ky.] 219.)

Negligence of the defendant, therefore, being the foundation of the plaintiff's cause of action, we proceed to the consideration of the facts of the case.

The defendant was a common carrier of passengers, and we need not discuss whether the common law imposed upon it any duty to treat those who were sick, nor whether it made it responsible for their proper care or management.

The duty that it assumed in this respect in this case was

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imposed upon it by the statute of Great Britain under the laws of which it was incorporated.

That statute, known and cited as "The Passengers' Act, 1855," and entitled "An act to amend the law relating to the carriage of passengers by sea," passed August 14, 1855, enacts:

1. (§ 41.) That "Every passenger ship * * * carry a duly qualified medical practitioner who shall be rated on the ship's articles."

2. (§ 43.) "The owner or charterer of every passenger ship shall provide for the use of the passengers a supply of medicine * * * proper and necessary for diseases * * * incident to sea voyages and for the medical treatment of the passengers during the voyage; and such medicines * * * shall in the judgment of the emigration officer at the port of clearance be good in quality and sufficient in quantity for the probable exigencies of the intended voyage, and shall be properly packed and placed under the charge of the medical practitioner * * * to be used at his discretion."

3. (§ 44.) "No passenger ship * * * shall clear out or proceed to sea until some medical practitioner to be appointed by the emigration officer at the port of clearance shall have inspected such medicines * * * as are required to be supplied by the last section * * * and shall have certified to the said emigration officer that the said ship contains a sufficient supply, etc."

And by section 42 it was further provided that "no medical practitioner should be considered to be duly qualified for the purposes of this act unless authorized by law to practice in some part of her Majesty's dominions as a physician, surgeon or apothecary, nor unless his name shall have been notified to the emigration officer at the port of clearance and shall not be objected to by him."

It was alleged and proved that the defendant, for the purpose of advertising its line, issued a prospectus which contained the following statement: "An experienced surgeon is carried on board every ship * * *. All medicines, medical comforts and attendance required are supplied gratis."

This prospectus it will be observed went no further in its representation than the requirements of the statute. A medical practitioner duly qualified as required by the provisions of the act quoted may fairly be assumed to be referred to and the fact that no charge was made for medicines neither added to nor qualified the duty resting upon the defendant under the law. The defendant's liability must be sought for in its failure to perform the duty imposed upon it by the statute.

Beyond that it had assumed none and had none to perform and consequently violated none owing to its passengers. If the things which the statute required it to do were performed with due and proper care, its duty to the passengers was discharged.

The obligations imposed by the statute were twofold. First, to employ a duly-qualified physician, and second, to provide a supply of medicines properly packed and labeled and suitable and necessary for disease incident to sea voyages. When these two things had been done and the certificate of their performance given by the government officers the ship was permitted to proceed upon its voyage and the medicines were from that time under the charge of the physician to be used at his discretion. No negligence is claimed to exist in the performance of either of these duties. No evidence was offered that the supply of medicine was insufficient in quantity or quality and the respondent's counsel concedes that the competency of the physician was established and the court charged the jury that for his negligence the defendant was not responsible.

The plaintiff, however, gave evidence by a passenger that he applied to the physician for medicine on the same evening that the plaintiff did and that he found the "Surgery" where the medicines were kept in disorder and confusion. That some of the bottles were in the racks and others on the racks and looked as if they were out of place, and it was by the trial court left to the jury to determine whether the "Surgery" was in such a condition of confusion as to show that the company did not use ordinary care in providing medicines and properly

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labeling them, or left them open so that a mistake was very liable to occur.

As already stated there was no evidence of a failure to provide an adequate and proper quantity of medicine of good quality and none that they were not properly packed and labeled or that the "Surgery" was not properly fitted up or that it was an improper place for the purposes designated.

All the evidence on that subject came from the defendant and was to the effect that all that the statute required was done and that the government officers certified to its performance. The negligence charged, therefore, rests in the confusion in the "Surgery" and the disarrangement of the bottles. It was affirmatively shown by defendant that between Glasgow and Greenock during the first two hours of the voyage the medicines were inspected by the medical examiner of the port of Glasgow with the assistance of the physician and that they were then properly packed and labeled and placed in the racks. The statute required that they should then be placed under the charge of the physician and be used at his discretion.

The medical examiner of the port left the vessel about six o'clock on the evening of the first day of the voyage, and the plaintiff applied for medicine about eight o'clock in the evening of the following day, and the question presented, therefore, is whether the testimony of confusion in the surgery or disorder in the arrangement of the medicine existing after the vessel put to sea and after the medicines were placed in charge of the physician, was evidence of such neglect of duty on the part of defendant as to render it liable for such injuries as the plaintiff sustained. We think it was not. Any other construction must assume that the ship owner is bound to exercise some supervision over the physician in his treatment of the passengers and his arrangement of the medicine. But no officer on the ship is competent to do that. The very object of the statute is that a skilled professional man shall be on board the ship to attend the passengers in case of sea sickness and dispense the drugs and medicines. Can we hold that a sailor shall have supervision over the doctor, or that an unskilled

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man with no ability to tell one drug from another shall have authority over the skilled experienced physician? To so hold would nullify the law, and put inexperience over experience and ignorance where the law requires knowledge and professional skill.

When the ship owner has employed a competent physician duly qualified as required by the law and has placed in his charge a supply of medicines sufficient in quantity and quality for the purposes required which meet the approval of the government officials and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers. That from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the ship owner and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment.

The work which the physician does after the vessel starts on the voyage is his and not the ship owner's.

It is optional entirely with the passengers, whether or not they employ the physician. They may use his medicines or not as they choose. They may place themselves under his care or go without attendance as they prefer, and they determine themselves how far and to what extent they will submit to his control and treatment. The captain of the ship cannot interfere. The physician is not the ship owner's servant, doing his work and subject to his direction. In his department, in the care and attendance of the sick passengers, he is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere except at the passenger's request. These views find support in *Larubheim v. DeK. N. S. Co.* (107 N. Y. 229), and in *Obrien v. Cunard S. Co.* (28 N. E. Rep. [Mass.] 266).

The first case arose before congress had legislated upon the subject, but it was said in the opinion that "if by law or by choice the defendant was bound to provide a surgeon for its ship, its duty to the passengers was to select a reasonably

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competent man for that office, and it is liable only for a neglect of that duty." The Massachusetts case was decided upon a statute of the United States similar to that of Great Britain and it was there said that the ship owners "do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner and supply him with all necessary and proper instruments, medicine and medical comforts and have him in readiness for such passengers as choose to employ him."

We think that is the extent of the requirement of the statute in this case and if there was any common-law liability resting upon the defendant to make provision for the care and attendance of its passengers when sick, it was no greater than that imposed by the statute.

These views lead to the conclusion that the evidence failed to show the neglect of any duty which the defendant owed to the plaintiff, and the motion to dismiss the complaint should have been granted.

The judgment should be reversed and a new trial granted.

All concur.

Judgment accordingly.

182 100
156 450

CATHARINE DIEFENDORF, Respondent, v. MARIAH DIEFENDORF
et al., Appellants.

In an action under the Code of Civil Procedure (§§ 1698, 1699) to determine conflicting claims to real property, plaintiff claimed title under a deed from D., her deceased husband; defendants claimed as his heirs at law. Plaintiff's evidence was to the effect that D., a few days before his death, sent for one A., asked him to draw a deed of his property to his wife, giving to him an old deed of the premises in question, and stating that he wished to give to her all of his property, real and personal, in consideration of \$3,000 she had paid to him, and other considerations. A. drew the deed, which was executed and acknowledged by D., a notary being in attendance at his request to take the acknowledgment. D. then delivered it to A., with instructions to retain it for his wife until after his death, and then have it recorded. *Held*, that the transaction was not an attempted testamentary disposition of property, but a gift by deed; that to perfect the gift it was not essential that the delivery should have been to plaintiff, but the delivery to A. for her use was sufficient, and upon such delivery the title passed to plaintiff.

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The period between the date of the deed and the commencement of the action was less than three years; her husband had been in possession for many years. Defendants moved to dismiss the complaint on the ground that plaintiff had not been in possession for three years, as required by the Code (§ 1688). *Held*, that the motion was properly denied, as she and the one whose estate she had, had been in possession for the three years, which was all that was requisite; that it was not essential that the possession for that period should have been adverse to defendants' claim.

The property was a village lot, mostly covered by a building, the first floor of which was used for stores. Plaintiff occupied two floors, and the rest of the building was rented to tenants, who paid the rent to her. *Held*, that this constituted such actual possession as authorized plaintiff to bring the action.

(Argued February 2, 1892; decided March 8, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 4, 1890, which reversed a judgment in favor of defendants entered upon a decision of the court on trial without a jury and granted a new trial.

The complaint alleged that plaintiff was in possession of real property under a claim of title by deed from her deceased husband and that defendants claimed the land as heirs at law of her husband. It demanded a judgment barring said defendants from any estate in said property, and that plaintiff's title be quieted and adjudged to be free from any right therein of the defendants.

The answer denied plaintiff's possession and alleged that John Deifendorf, plaintiff's husband, was seized of the property at the time of his death, and died intestate leaving plaintiff as his widow and defendants as his heirs at law.

The defendants introduced no evidence upon the trial. It appeared that John Deifendorf, a few days before his death, being sick, sent for one Douglass Ayres, a physician, and a son of his attending physician, and asked him if he would draw a deed of his property and gave him an old deed containing the description of the property in suit. He told Doctor Ayres that he wished to give all his property to his wife, real and

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personal, and stated to him what it was. That it was to be in consideration of three thousand dollars that she had paid to him and other considerations. Doctor Ayres drew the paper which is the subject of this controversy and it was executed by Deifendorf and delivered to the doctor, with instructions to retain it for his wife until after his death and then have it recorded. After his death it was recorded.

The Special Term found this paper not to have been a deed but an attempted testamentary disposition of the property and that Deifendorf died intestate and that defendants were entitled to the property subject to the plaintiff's dower therein. The General Term reversed the judgment upon the law and facts and granted a new trial. From that order defendants appealed to this court.

E. Countryman for appellants. Both of the courts below erred in holding that the defendants were not entitled to a ruling dismissing the complaint upon the ground that the plaintiff was not shown to have been in actual possession of the premises for three years before the commencement of the action. (Code Civ. Pro. §§ 1638, 1639, 1642; *Pearce v. Moore*, 114 N. Y. 256; *Churchill v. Onderdonk*, 59 id. 134; *Boylston v. Wheeler*, 61 id. 521; *Van Wagener v. Botsford*, 13 Wkly. Dig. 381; *Benson v. Townsend*, 26 N. Y. S. R. 644, 647; *Cleveland v. Crawford*, 7 Hun, 616; *Onderdonk v. Mott*, 34 Barb. 106; *Stevens Case*, 84 N. Y. 296, 304, 305; *P. Bank v. Mitchell*, 73 id. 406, 415; *Arnold v. Angell*, 62 id. 508, 512; *McMichael v. Kilmer*, 76 id. 36; *R. E. Bank v. Eames*, 4 Abb. Ct. App. Dec. 83; *Barnes v. Quigley*, 59 N. Y. 265; *Sanford v. Bennett*, 24 id. 20; *Benton v. Wickwire*, 54 id. 226; *Goillotel Case*, 87 id. 441; *People v. Supervisors*, 43 id. 130; *In re Miller*, 110 N. Y. 216; *Ely v. Holton*, 15 id. 595, 596; *People v. Supervisors*, 67 id. 109; *In re Peugnet*, Id. 441; *Craig v. Andes*, 93 id. 406, 417; *Sayre v. Wisner*, 8 Wend. 661; *Quackenbush v. Danks*, 1 Den. 128; *Dash v. Van Kleeck*, 7 Johns. 478; *People v. Ryder*, 124 N. Y. 500; *Van Horn Case*, 57 id. 473.) Upon

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the new theory of the action adopted on the trial, no case was made for relief in equity. (*Bailey v. Southwick*, 6 Lana. 356, 363-366; *Bailey v. Briggs*, 56 N. Y. 407, 415, 416; *Schroeder v. Gurney*, 10 Hun, 413; 73 N. Y. 430; *Ward v. Dewey*, 16 id. 519, 522; *Marsh Case*, 59 id. 280; *Washburn v. Burnham*, 63 id. 132; *Townsend Case*, 77 id. 542.) The General Term was not justified in reversing the decision of the trial judge upon any of the material issues of fact. To justify a reversal upon the facts by the General Term, it must appear that the findings were against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said, with a reasonable degree of certainty, that the trial court erred in its conclusions. (*Lowery v. Erskine*, 113 N. Y. 52, 55; *Baird Case*, 96 id. 567, 577.) It was a question of fact upon the evidence whether the paper was intended to operate as a deed or as a testamentary disposition, and whether it was delivered as a deed in any manner to the grantee; and the findings of the trial court should, therefore, be maintained. (*Crain v. Wright*, 36 Hun, 74, 77; 114 N. Y. 307.) It was indispensable to the validity of the instrument as a deed that it was in fact delivered at the time "with the intent that it should take effect as a present conveyance of the land." (*Crain v. Wright*, 114 N. Y. 307, 311, 312; *Wellborn v. Weaver*, 17 Ga. 267; *Fisher v. Hall*, 41 N. Y. 416, 420; *Best v. Brown*, 25 Hun, 223; *Rousseau v. Blair*, 60 id. 259, 266; *Smith v. Hathorn*, 25 id. 159; *Scattergood v. Wood*, 14 id. 269; *Stilwell v. Hubbard*, 20 Wend. 44; *Williams v. Schatz*, 42 Ohio St. 47; *Brown v. Brown*, 66 Me. 316; *Prutsman v. Baker*, 30 Wis. 644; *Anderson Case*, 126 Ind. 62; *Hale v. Joslin*, 134 Mass. 310; *Porter v. Woodhouse*, 59 Conn. 568; *Bell v. F. Bank*, 11 Bush. 34; *Cusack v. Tweedy*, 126 N. Y. 87.) The deed executed in 1885, even if it had been delivered, is void at law. (*Johnson v. Rogers*, 35 Hun, 267; *Laws of 1887*, chap. 537; *Beard v. Beard*, 3 Atk. 72; *Shepard v. Shepard*, 7 Johns. Ch. 122; *Hunt v. Johnson*, 44 N. Y. 27; *Whitaker v. Whitaker*, 52 id. 368.)

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N. C. Moak for respondent. The General Term having reversed the judgment upon the trial upon questions of fact, the facts are to be reviewed here and to be determined by this court. (Code Civ. Pro. § 1338; *Van Wyck v. Watts*, 81 N. Y. 352; *Hubbell v. Meigs*, 50 id. 480; *Gurntey v. Miller*, 80 id. 181, 183; *National City v. New York*, 97 id. 645; *Ross v. Gleason*, 111 id. 683.) The General Term having reversed the judgment of the trial court upon the facts, this court will not reverse the General Term unless there was no evidence upon which it was authorized to determine the facts in such a way as to lead to a reversal. (*Nostrand v. Knight*, 124 N. Y. 618; *Shultz v. Hoagland*, 85 id. 464; *Godfrey v. Mosher*, 66 id. 250, 252.) The trial court was bound to decide the case according to the evidence. On failure to do so it was the duty of the General Term to do so. (*Plyer v. German*, 121 N. Y. 692; *Lomer v. Meeker*, 25 id. 361; *Kelly v. Burroughs*, 102 id. 93, 95, 96; *Watson v. Campbell*, 38 id. 153, 155-157; *A. Ins. Co. v. Aldrich*, 26 id. 22.) The trial court erred in finding that there was no consideration paid by plaintiff or received by John Diefendorf as consideration for the deed, either before or after the deed. (*Jackson v. McChesney*, 7 Cow. 361; *Hauschurst v. Ritch*, 119 N. Y. 621; *Crushman v. Henry*, 75 id. 103; *Hand v. Kennedy*, 83 id. 140.) The trial court erred in refusing to find that plaintiff took and held possession of said premises as owner thereof. (*Landon v. Townsend*, 41 N. Y. S. R. 419, 424, 425.) Though a deed from husband to wife is void in law it is valid in equity if founded on good and valid consideration. (*Hunt v. Johnson*, 44 N. Y. 27; *Tallinger v. Mandeville*, 113 id. 432; *Dygert v. Remerschnider*, 32 id. 629; *Townsend v. Townsend*, 1 Abb. [N. C.] 81, 83; *Chadburn v. Gilman*, 64 N. H. 353; *Majors v. Everton*, 89 Ill. 56, 57; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Kelly v. Campbell*, 1 Keyes, 29; *Peck v. Brown*, 2 Robt. 119; *Childs v. Connor*, 6 J. & S. 471, 474; *Phillips v. Wooster*, 36 N. Y. 412, 414; *Neuforth v. Thompson*, 3 Ed. Ch. 92; *Brockway v. Fleming*, 22 Wkly. Dig. 430; 37 Hun, 640; *Armitage v. Mace*, 96 N. Y. 538; *Shuttleworth v. Win-*

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ter, 55 id. 629; *Seymour v. Fellows*, 12 J. & S. 124; 77 N. Y. 178; *Mack v. Mack*, 3 Hun, 323; *Crooks v. Crooks*, 34 Ohio St. 610; *Deming v. Wilson*, 26 Conn. 230; *Jones v. Clifton*, 101 U. S. 225; *Lloyd v. Fulton* 91 id. 485; *McGregor v. McGregor*, L. R. [21 Q. B. Div.] 424; *Dale v. Lincoln*, 62 id. 22; Story's Eq. Juris. § 1374; *Earl v. Peck*, 64 N. Y. 596, 599; *Darrow v. Walker*, 10 J. & S. 6. 10; *Lawrence v. McCalmart*, 2 How. [U. S.] 452; *Miller v. McKenzie*, 95 N. Y. 582; *Cowee v. Connell*, 75 id. 98; *McCarthy v. Kearnan*, 75 Ill. 292; *Notbeck v. Wilks*, 4 Abb. Pr. 315, 317-321; *Goodell v. Pierce*, 2 Hill, 659, 661; *Tooley v. Dibble*, 2 id. 641, 643; *Brown v. Austin*, 35 Barb. 358, 359; *Foster v. Mansfield*, 3 Metc. 412, 414, 415; *Thatcher v. Wardens*, 37 Mich. 264; *Sowerby v. Arden*, 1 Johns. Ch. 252; *Bunn v. Winthrow*, 1 id. 236; *Hathaway v. Payne*, 34 N. Y. 92; *Crain v. Wright*, 36 Hun, 74, 77, 78; 114 N. Y. 307; *Ernest v. Reed*, 49 Barb. 373; *Mitchell v. Ryan*, 30 Ohio St. 377; *Munoz v. Wilson*, 111 N. Y. 295; *Squires v. Summers*, 85 Ind. 252; *Latham v. Udell*, 39 Mich. 238; *Wallace v. Berdell*, 97 N. Y. 13, 24, 25; *Verplank v. Sterry*, 12 Johns. 536; *Church v. Gilman*, 15 Wend. 556-662; *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 4 Kent's Comm. 529.) The court erred in finding that the plaintiff is not the owner in fee of the premises in question and in not finding as requested that she was the equitable owner thereof. (*Crain v. Wright*, 114 N. Y. 307; *Carnwright v. Gray*, 127 id. 92, 96-104; 57 Hun, 518; Tideman on Com. Paper, § 152; 1 Rand. on Com. Paper, §§ 7, 86, 88, 96, 178; *Kinsman v. Birdsall*, 2 E. D. Smith, 395; *Hawthurst v. Ritch*, 6 N. Y. Supp. 134; 119 N. Y. 621, 622; *C. C. Bank v. Warden*, 6 id. 19, 28, 30; *Hughes v. Wheeler*, 3 Cow. 77-84; *Rockefeller v. Robinson*, 17 Wend. 206, 207; *Smith v. Smith*, 2 Johns. 235; *Mack v. Spencer*, 4 Wend. 411; *Smith v. Van Doane*, 16 id. 659; *Richards v. Warring*, 39 Barb. 45; *Bruce v. Westcott*, 3 id. 379; *Burley v. Burnhard*, 9 N. Y. S. R. 587, 589; 27 Wkly. Dig. 6; 45 Hun, 588; *In re Kimmer*, 14 N. Y. S. R. 618, 619; 47 Hun, 635; *Rowe v. Comley*, 11 Daly, 318, 319;

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Brooks v. Schwerin, 54 N. Y. 343; *Pursell v. Fry*, 19 Hun, 595, 599; *Adams v. Honness*, 62 Barb. 326; *Foote v. Bryant*, 47 N. Y. 544; *Huston v. Cone*, 24 Ohio St. 11, 20, 21; *Hodges v. Hodges*, 9 R. I. 32; *Savage v. O'Neil*, 44 N. Y. 298, 301, 302; *Jaycox v. Caldwell*, 37 How. Pr. 240, 248; 51 N. Y. 395; *Holden v. Burnham*, 5 T. & C. 195; 2 Hun, 678; *Chadbourne v. Gilman*, 64 N. H. 313, 314; *Van Amburgh v. Kramer*, 16 Hun, 207; *Childs v. Barnum*, 11 Barb. 14; 1 Sandf. 58; *Ring v. Steele*, 3 Keyes, 451; 4 Abb. Ct. App. Dec. 70; *Grant v. Townsend*, 2 Hill, 557; *Wolcott v. Ronalds*, 2 Robt. 620; *Goit v. Nat. Prot.*, 25 Barb. 190.) Upon the facts found by the court, the plaintiff was entitled to judgment. The claim made by defendants constituted a cloud upon plaintiff's title to the premises. (*Tisdale v. Jones*, 38 Barb. 523; *Lounsbury v. Purdy*, 18 N. Y. 515; 16 Barb. 376; *Craft v. Merrill*, 14 N. Y. 456; *Foote v. Bryant*, 47 id. 545; *Bate v. Graham*, 11 id. 237; *Lewis v. Mott*, 36 id. 395; *Barlow v. Scott*, 24 id. 40; *Kenny v. Appgar*, 93 id. 539; *Baird v. Mayor, etc.*, 74 id. 386; *W. P. I. Co. v. Reymert*, 45 id. 705; *McKeon v. See*, 51 id. 300; *Gilchrist v. Comfort*, 36 How. Pr. 393.) The answer contained no counter-claim. (*Pruyn v. Tyler*, 18 How. Pr. 331, 333; *Page v. Fazackerly*, 26 Barb. 392, 395, 396; *Smith v. Hill*, 22 id. 656, 660; *Munson v. Hegeman*, 10 id. 112; *Connop v. Meir*, 2 E. D. Smith, 304; *McKenzie v. Farrell*, 4 Bosw. 202; *Thompson v. Lumley*, 7 Daly, 74; *Billings v. Vanderbeck*, 23 Barb. 554; *Fox v. Decker*, 3 E. D. Smith, 150; *Seabury v. Ross*, 69 Ill. 533; *Tasker v. Chamberlain*, 38 N. Y. S. R. 476; *Equitable Life v. Cuyler*, 75 N. Y. 511, 514; *Simmons v. Kayser*, 11 J. & S. 131, 137, 138; *Burrall v. DeGroot*, 5 Duer, 379, 382; *Bates v. Rosekrans*, 37 N. Y. 409; *Wood v. Gordon*, 38 N. Y. S. R. 455, 456; *Caryl v. Williams*, 7 Lans. 416; *Resch v. Lenn*, 31 Wis. 138; *Gaff v. Greer*, 88 Ind. 122; *McConihe v. Hollester*, 19 Wis. 269; *Dietrich v. Koch*, 35 id. 618.)

BROWN, J. The complaint contained all the allegations essential to constitute this an action to determine claims to real property. (Code C. P. §§ 1638, 1639.)

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The appellants claim that the proof did not show that the plaintiff was in actual possession of the property. The court found that after her husband's death she continued to reside upon it and assumed to be its owner and collected the rents from the part not used by her.

The property was on the corner of Division and Canal streets in the village of Fort Plain, and a large building covered nearly the whole lot. The first floor was used for stores.

The plaintiff occupied the second and third floors, partly for a millinery and partly as a residence. She testified that she had property in every room in the second and third stories. The other parts of the building were rented to tenants who paid their rent to the plaintiff.

In this occupation there was that foothold upon the ground which is essential to constitute actual possession.

Upon the trial defendants moved to dismiss complaint on the ground that the plaintiff had not been in possession for three years.

Under the statute it was requisite to the maintenance of the action that there should have been possession for three years or more by the plaintiff or by her and "those whose estate she had." The plaintiff's husband had been in possession for many years and it was only necessary that the total time of the possession of both should be three years. It is not essential that such possession should be adverse for three years to the defendants' claim.

Between the date of the conveyance under which plaintiff claimed and the commencement of this action, there was a period of about two years and eight months, and we think the action was properly brought.

Upon the facts of the case we concur in the result reached by the General Term.

The weight of the testimony was to the effect that Diefendorf intended to make a present conveyance of his property to his wife, and we think there is very slight ground to hold that he intended to make a will.

He inquired of Doctor Ayres if he could draw a deed. The

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statement that he desired to give his property to his wife must be construed in that connection. He contemplated and intended a gift by deed.

In form the instrument is a deed. It was sealed and acknowledged as such, and the deceased appeared to understand the necessity of an acknowledgement as he directed the procurement of a notary public to take it.

There was nothing in his request to the doctor after its execution to indicate an intention not to make the conveyance effectual immediately. The only direction he gave was that it should not be recorded, but the delivery was for his wife. It was not essential that the delivery should have been to the plaintiff. Delivery to Doctor Ayres for her use was enough. (*Church v. Gilman*, 15 Wend. 656.)

The deceased reserved no control over the deed, and there is no question in this case as to its acceptance. The title passed to the plaintiff.

The order should be affirmed and judgment absolute rendered against the appellants.

All concur, except LANDON, J., not sitting.

Order affirmed and judgment accordingly.

OSCAR SCHMIDT, Respondent, v. CHARLES H. REED et al.,
Appellants.

While at law the stipulated time of performance of a contract for the sale of land is of the essence of the contract it is not essentially so in equity, and when the situation of the parties and the property remains unchanged relief may be granted.

Reasonable diligence, in performance however, is requisite to such relief where there is no acquiescence in the delay.

When, by the terms of such a contract the time for the performance is not of the essence thereof, it may be made so by reasonable notice by either party, to the other, and the party giving the notice may then avail himself of the forfeiture on default.

The parties hereto entered into a contract for the sale by defendants and the purchase by plaintiff of certain premises, by the terms of which plaintiff agreed to pay a specified portion of the purchase-price by taking the prem-

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ises subject to a mortgage thereon for an amount specified, "having five years to run from November, 1886." The mortgage, in fact, matured in three years from that time. Three days before the time fixed in the contract for its performance plaintiff notified defendants of the mistake in the time of payment of the mortgage, of which fact, until such notice, they were ignorant, and also notified them that he would not accept a deed unless defendants procured at the time fixed for passing title a proper and sufficient extension of the mortgage, so as to conform to the contract. Defendants lived in New York; the owner of the mortgage in Philadelphia. When the parties met at the time stipulated defendants had not procured the extension, they tendered a deed and also ample security against any possible damage by reason of the mistake, which plaintiff refused. Defendants then asked for an extension of the time of performance for a week or ten days to enable them to procure an extension of time of payment of the mortgage; this also, plaintiff refused. Eight days after the meeting such an extension was procured and tendered by defendants to plaintiff, with expenses of recording and the deed. Plaintiff refused to accept; he had on the same day, prior to the tender, commenced this action to recover back the payment made by him on execution of the contract and expenses. The testimony was conflicting, as to whether defendants during the three days between the time of notice of the mistake and that for performance, made any efforts to procure the extension. Plaintiff's evidence was to the effect that when so notified, defendants said they would not apply for an extension. The evidence showed and the court found that plaintiff, at the time of executing the contract, made special inquiries as to the time when the mortgage would mature, and relied upon the representation in the contract; also, that five days after the time fixed for performance he purchased other premises. *Held*, that plaintiff was not required to accept the security offered in lieu of performance; that the question as to whether the three days was a sufficient or reasonable time in which to obtain the extension, and as to whether defendants had used due diligence to procure it in that time were questions of fact; and that the evidence justified a finding that defendants were not entitled to relief from their default.

Reported below, 26 J. & S. 570.

(Argued February 3, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of April, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The action was founded upon the alleged default of the

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defendants in performance of a contract made by them to sell and convey to him certain premises in the city of New York; and plaintiff asked to recover a sum advanced by him to the defendants upon such contract, also certain expenses incurred by him in examining the title to the property. The defendants by way of counter-claim, alleged facts upon which they demanded specific performance of the contract.

It appears that on October 18, 1888, the parties entered into an agreement whereby the defendants agreed to sell and convey the premises to the plaintiff for \$34,000, payable as follows: \$500 at its date, \$22,500 "by taking said premises subject to a mortgage for that amount (then) a lien thereon bearing interest at 5 per cent and having five years to run from November, 1886," and the balance, \$11,500, in cash on closing the title, and the defendants agreed to convey the land to the plaintiff on the 15th day of November, 1888, by warranty deed free from incumbrance, except such mortgage. It turned out that the time of maturity of the mortgage was not five years from November 1, 1886, as mentioned in the contract, but was three years from that time. This was the objection of the plaintiff to the completion of the purchase, and at the meeting of the parties on the fifteenth of November, he declined to extend the time to enable the defendants to procure an extension of the time of payment of the mortgage until November, 1891, or to accept security from the plaintiff in that respect.

Wm. C. Reddy for appellants. Time was not the essence of the contract. (*Hubbell v. Van Schoenig*, 49 N. Y. 326; 2 Pars. on Cont. chap. 3, § 384; 7 Johns. 476; 4 Barb. 614; *McMulkin v. Bates*, 46 How. Pr. 405; *Secombe v. Steele*, 20 How. [U. S.] 94.) The notice or demand to limit time for closing title was not conformable to the requirements of equity, in that it did not allow reasonable time for performance. (*Meyers v. De Mier*, 52 N. Y. 647; Fry on Spec. Perf. § 724; *King v. Wilson*, 6 Beav. 124; *Parkin v. Thorald*, 16 id. 59.) The alleged notice did not conform to the established rules of equity

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in that it was indefinite. (Fry on Spec. Perf. § 728.) No notice limiting the time for closing title to November fifteenth was ever given. It was error in the court to so find. (Fry on Spec. Perf. § 724.) The court erred in not dismissing the complaint at the close of the testimony. (*Reading v. Gay*, 37 N. Y. Supp. 79; *Keating v. Gunther*, 10 id. 734; 2 Pars. on Cont. chap. 3, § 384; *McMulkin v. Bates*, 46 How. Pr. 405.) The court should have decreed specific performance by the plaintiff. (*Hill v. Buckley*, 17 Wis. 345; *Pulsford v. Richards*, 17 Beav. 87; *Burch v. Vanderburg*, 1 Edw. 21; Story's Eq. Juris. 777; 2 Johns. 595; 8 Paige, 453; *Schiffer v. Dietz*, 83 N. Y. 300; *Jenkins v. Fahey*, 73 id. 355; *Hubbell v. Van Schoenig*, 49 id. 326; *Day v. Hunt*, 112 id. 191; *Murray v. Post*, 8 N. Y. Supp. 714.)

E. Beneville for respondent. Under no circumstances could the facts alleged constitute a counter-claim to the cause of action set up in the complaint. (*Briggs v. Briggs*, 20 Barb. 477; *Newell v. Salmon*, 22 id. 647; *Chamber v. Lewis*, 11 Abb. 210; *Lafarge v. Kelsey*, 1 Bosw. 171; *Chamboret v. Cagney*, 41 How. 125.) The alleged counter-claim does not, in terms, set forth a cause of action in defendant's favor entitling them to relief. (*Bank of Columbia v. Hagner*, 1 Pet. 464; *Colson v. Thompson*, 2 Wheat. 336; Story's Eq. Juris. § 780; *Hinckley v. Smith*, 51 N. Y. 21; Pom. on Cont. §§ 210, 218; *Cadman v. Homer*, 18 Ves. 10.) A court of equity will distinguish between the case of a vendor, coming into a court of equity to compel a specific performance and of a vendee seeking to compel a vendor to perform. (*Sutherland v. Briggs*, 1 Hare, 34; 3 Johns. Ch. 222.) Either party can make time of the essence of the contract, by giving notice that he so wishes it. (*Dominick v. Michael*, 4 Sandf. 374; Pom. on Cont. § 403.) Where a party's circumstances have been materially changed and a decree of specific performance would be a hardship, such performance will not be decreed. (*Hatch v. Cobb*, 4 Johns. Ch. 559; 1 Fonb. Eq. Ch. 6, § 2.)

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BRADLEY, J. At the time stipulated by the contract for its performance the parties came together. The plaintiff was ready to complete the purchase and the defendants had prepared a deed which they proposed to deliver. The plaintiff declined to accept it because he had learned that the time for the maturity of the mortgage, subject to which the title was to be conveyed, was two years earlier than it was represented to be by the contract. This was a mistake of the defendants without fraud or purpose on their part to deceive the plaintiff. The effect of this provision of the contract was that the payment of the principal sum of the mortgage without default in payment of interest should not be enforceable within five years from November 1, 1886. And this provision could be satisfied by an instrument effectually extending until then the time of its payment. When the parties were together on November 15, 1888, the stipulated time to complete the sale and purchase, the defendants, at the time of tendering their deed, also tendered to the plaintiff ample security against any possible damage by reason of the mistake in respect to time of the maturity of the mortgage which was refused by the plaintiff. The defendants also then requested a postponement of the time of performance of the contract for a week or ten days to enable them to obtain and deliver to the plaintiff an instrument of extension of the time of payment of the mortgage corresponding with that mentioned in the contract. This the plaintiff also refused to grant. On November twenty-third, eight days after that meeting of the parties, the defendant having obtained it from the mortgagee, tendered to the plaintiff a written extension of the time of payment of the principal sum of the mortgage to November 1, 1891, and sufficient money to pay for recording it, with a deed of conveyance of the premises. The plaintiff refused to receive them. He had on the same day and prior to the tender commenced this action by service on the defendant Schmohl, of which the other defendant, when he made the tender, was not advised.

The question is whether this offer of performance at that time by the defendants constituted a defense to the action and

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entitled them to specific performance. While at law the stipulated time of performance of a contract for the sale and conveyance of land is of the essence of the contract, it is not essentially so in equity, and there, when the situation of the parties and property remains unchanged, relief will not necessarily be defeated by delay. But where there are no circumstances of acquiescence in the delay, reasonable diligence is requisite to such relief. (*Edgerton v. Peckham*, 11 Paige, 352; *Hubbell v. Von Schoening*, 49 N. Y. 326.)

The parties to a contract may by its terms make the time of performance essentially important and its observance in that respect requisite to relief. (*Benedict v. Lynch*, 1 John. Ch. 370.) And when that is not so either of the parties to the contract may, by a reasonable notice to the other party for that purpose, render the time of performance as of the essence of the contract and avail himself of forfeiture on default. (*Myers v. De Mier*, 52 N. Y. 647.) Time was not necessarily of the essence of the contract in question. But the trial court found that the plaintiff notified the defendants on the 12th of November, 1888, that the mortgage would mature on the 1st of November, 1889, and that he would not accept a deed of the premises unless the defendants procured for him at the time fixed for the passing of the title, a proper and sufficient extension of the mortgage until November, 1891, and upon that fact the court determined that such notice made time of the essence of the contract.

It is urged on the part of the plaintiff that the notice was insufficient for the purpose, in that the defendants were not by it given a reasonable time to procure the extension, and that it was not specific as to the time when the default would be treated by the plaintiff as a forfeiture of the right to tender performance. The plaintiff did not until the day the notice was given ascertain that the time of maturity of the mortgage was other than that stated in the contract. The mortgagee resided in Philadelphia, of which the plaintiff was advised at the meeting of the fifteenth of November, and whether the three days was a sufficient or reasonable time to obtain from

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him the extension before the stipulated time of performance of the contract if it was obtainable, was a question of fact, as was also the question whether the defendants had used due diligence to procure it at that time. The court did not find that the defendants were or were not chargeable with *laches* in that respect. But there was evidence on the part of the plaintiff (contradicted by that on the part of the defendants) to the effect that the defendants had then made no effort and done nothing to procure the extension of the mortgage. And while the conflicting evidence on that subject cannot be referred to for the predication of error, it may here, so far as applicable, be considered in support of the conclusion of the trial court. If it appeared by the record that it contained all the evidence of the trial it may be that the construction given to the finding before mentioned could be the subject of some criticism, as it does not distinctly appear by the evidence that the time when the extension should be produced was specified. The evidence of the plaintiff's attorney, as there represented, in speaking of the notice given on November twelfth, is: "I told him (defendants' attorney) we should insist on an extension of the time for the payment of the mortgage, else my client would not take title. He said it seemed ridiculous to now ask an extension," as the mortgage then had a year to run. "I said I would submit the matter to the plaintiff," and added that he informed the defendants or one of them the evening of that or the following day that the plaintiff insisted upon extension of the mortgage to November 1, 1891; and that no purpose was expressed on their part to obtain it, but that on the contrary they said they did not expect to get it at that time. It cannot now and upon the record be held that there was not sufficient evidence to warrant the conclusion that the defendants were advised by the plaintiff that his completion of the purchase was dependant upon the production on the fifteenth of November, of an extension of the time of maturity of the mortgage. It may be that a different question would be presented if it had been found or conclusively established by the evidence that the plaintiff was advised that the

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purpose or expectation of the defendants was to obtain it. But upon that subject the evidence on the part of the plaintiff (in conflict with that on the part of the defendants) was to the effect that it was then said by the defendants that they would not apply for an extension, and by their attorney that he had made no effort to get it, and that he had no reason to believe he could obtain it. And the court was by the defendants requested and refused to find "that the plaintiff was not on or prior to November 15, 1888, induced or caused by the defendants to believe that the defendants had abandoned the contract and had no intention of carrying out the same." In view of this evidence the conclusion was justified that the plaintiff was relieved from the obligation of the contract when the interview of November fifteenth terminated, if the time of the maturity of the mortgage as incorrectly represented by the contract was a material fact which may have prejudiced the plaintiff. On that subject the court found that at the time of making the contract the plaintiff made special inquiries as to the time the mortgage would mature, and relied upon the representation that it had five years to run from November 1, 1886, and by it was induced to enter into the contract. It must, therefore, be assumed that the plaintiff was at liberty to treat it as an essential fact, and to refuse to complete the purchase without the extension to such time. And the court also found that on November 20, 1888, the plaintiff, in ignorance of the fact that the defendants had taken any steps looking to the procurement of an extension of the mortgage, entered into an agreement for the purchase of certain other premises in the city of New York.

Upon this state of facts which there was evidence tending to prove, the conclusion of the trial court that the defendants were not entitled to relief from their default was warranted. Nor was the plaintiff required in lieu of performance of the contract in respect to the mortgage, to accept security against damage by reason of the maturity of the mortgage at a time two years earlier than that so represented. He was entitled to performance, so far as they were substantial, of the provis-

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ions of the contract pursuant to its terms. And substituted conditions not in the contemplation of the parties, and in any sense substantially modifying the stipulations of the contract, cannot without their mutual consent be made effectual to compel performance.

Although time may not necessarily be of the essence of a contract for the sale of real estate, it is treated in this state as material in such sense that unreasonable or unexcusable delay of one of the parties to it may deny to him relief; and when during his default or delay circumstances have intervened which will render subsequent performance by the other party prejudicial or detrimental to him, those facts are properly matters of consideration and will ordinarily relieve him from the obligation of the contract. (*Merchants' Bank v. Thomson*, 55 N. Y. 7; *Day v. Hunt*, 112 id. 191; *Hubbell v. Von Schoening*, 49 id. 326.)

While it may be that the evidence would have permitted a different result in the court below, the conclusion there reached was fairly justified and none of the exceptions were well taken.

The judgment should be affirmed.

All concur.

Judgment affirmed. _____

JAMES M. JOHNSON et al., Appellants, v. EMILY GOLDER,
Impleaded, etc., Respondent.

The complaint herein alleged that plaintiff J. acquired title to certain premises subject to a mortgage, as devisee under the will of N., who died in 1880, which will was admitted to probate in February, 1880; that in May, 1880, defendant B., who then owned the mortgage, brought an action to foreclose it, fraudulently omitting to make J. a party, and by perjury obtained an adjudication that there was due thereon \$5,869.87, when in fact there was only about \$1,000 unpaid; that the purchaser on the foreclosure sale fraudulently executed a mortgage on the premises to defendant G., which was foreclosed without making J. a party, and the premises bid off and conveyed to C., the attorney of record for G. in that action; that several of the defendants who were named, including G., collected rents exceeding the amounts due on both mortgages. Judgment was demanded that the pretended mortgage to G. be canceled and

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stricken from the records; that defendants account for the rents and profits received by either of them; that plaintiffs be at liberty to redeem upon payment of whatever was found due, etc. Defendant G. demurred on the ground that two causes of action were improperly united, and that as against her, it did not state facts sufficient to constitute a cause of action. *Held*, untenable; that but one cause of action was stated, and that sufficient facts were stated to entitle plaintiffs, as against G., to an accounting.

G. claimed that it did not appear on the face of the complaint that plaintiff J. was the owner of the fee of the mortgaged premises and a necessary party to the foreclosure suit which was brought by B. in May, 1890, as it was not alleged that P., under whose will J. claimed to have acquired title, was then dead. *Held*, that the fair inference from the averments that P. died in 1880 and that her will was admitted to probate in February of that year, was that she died before the probate; that if a more precise statement was required, defendant should have moved to have the complaint in this particular made more definite and certain.

(Argued February 4, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made January 29, 1890, which affirmed a judgment in favor of defendant Emily Golder, entered upon an order of Special Term sustaining a demurrer to and dismissing the complaint as not stating facts sufficient to constitute a cause of action as against her.

This was an action to redeem certain premises in the city of Brooklyn from a mortgage.

It is alleged in the complaint that about February 13, 1880, James M. Johnson, one of the plaintiffs, became seized in fee of the premises described in the complaint, subject to a mortgage executed April 27, 1854, by a former owner to secure the payment of \$3,300, with interest on the 27th of April, 1857, which mortgage, it is alleged, was duly assigned November 26, 1859, by the mortgagees to James M. Johnson, who, November 12, 1879, duly assigned it to Henry W. Bates, at which date there was due and unpaid thereon only \$1,000. It also averred that May 19, 1880, Henry W. Bates began an action to foreclose the mortgage, and fraudulently omitted to make said Johnson, the owner in fee, a party to the action,

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and by perjury obtained June 12, 1880, an adjudication that there was then due on the mortgage \$5,869.87, and for a sale of the premises, which were thereafter sold under the judgment, and were bid in by Bates, who assigned his bid to Alexander B. Crane and Louisa E. Bates (now the wife of Henry W. Bates), and that July 23, 1880, the referee conveyed to them, and that May 10, 1881, Crane conveyed his interest in the premises to Louisa E. Bates.

It is also averred that February 10, 1885, Louisa E. and Henry W. Bates fraudulently executed to Emily Golder a mortgage on the premises to secure the payment of \$2,500, which was recorded and became due in 1887; and that February 11, 1885, Mr. and Mrs. Bates fraudulently conveyed the premises to Frances A. Denike, and that thereafter Emily Golder foreclosed her mortgage without making James M. Johnson a party to the action, and July 11, 1889, the premises were sold under the judgment, and October 14, 1889, were conveyed by the referee to Samuel F. Cowdry.

The plaintiffs also alleged that before this action was begun, James M. Johnson conveyed to his co-plaintiff a three-fourths interest in his claim against the defendant, and also: "19. That the said defendants Henry W. Bates, Louisa E. Bates, Emily Golder and Samuel F. Cowdry have collected, and are collecting, the rents for the said premises, which amount to the sum of \$600 per annum, as the plaintiffs are informed and verily believe." "20. That the rents, profits and income of the said premises have been collected and received by the defendants, and have largely exceeded the amount due upon both mortgages." A judgment was demanded that the defendants account for all the rents, profits and income received by them, or either of them, and that the plaintiffs be at liberty to redeem upon payment of whatever may be found due, which amount they offered to pay. Among other relief demanded, it was asked that the pretended mortgage made to Emily Golder be canceled and stricken from the records.

To this complaint Emily Golder demurred upon the grounds (1) that two causes of action were improperly united therein;

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(2) that as against her it did not state facts sufficient to constitute a cause of action.

Further facts are stated in the opinion.

Irà Leo Bamberger for appellants. Under section 488 of the Code of Civil Procedure, a demurrer to a complaint will not lie, if it states a cause of action against some of the defendants, although it may not against the demurrant. (*Barnes v. Blake*, 13 N. Y. Supp. 77; *Fowler v. M. L. Ins. Co.*, 28 Hun, 195; *Fish v. Horse*, 59 How. Pr. 238.) If the complaint sets forth any facts which entitle the plaintiff to some relief, legal or equitable, a demurrer to it cannot be sustained. (*Price v. Brown*, 10 Abb. [N. S.] 71; *Milliken v. W. U. T. Co.*, 110 N. Y. 463; *Swart v. Boughton*, 35 Hun, 281; *Townsend v. Bogert*, 126 N. Y. 374; Story's Eq. Pl. § 311.) This action is addressed to the equity branch of the court, and all persons in any way interested may be made parties, even though their interest might be remote or contingent. The law favors actions in that form, so that all disputed controversies or rights may be settled and determined in one action. (Story's Eq. Pl. § 539; *Garner v. Thorne*, 56 How. Pr. 452; Pom. on Rem. 496; *Wyles v. Suydam*, 64 N. Y. 173; *Chapman v. Forbes*, 123 id. 538; *Bradner v. Holland*, 33 Hun, 290.) An action to redeem from a mortgage is merely an inverted form of an action to foreclose a mortgage. The same principles of law underlie and apply to each action, the object being in each to satisfy the claims of the mortgagee holding the land as security for the payment of the debt. (*Smith v. Davis*, 4 Civ. Pro. Rep. 158; *Hospital v. Dowley*, 57 How. Pr. 489; *Brown v. Volkennig*, 64 N. Y. 76; Code Civ. Pro. § 488; *Sullivan v. N. Y. R. R. Co.*, 1 Civ. Pro. Rep. 285; *Good v. Tucker*, 24 N. E. Rep. 15.)

F. H. Cowdrey for respondent. The defendant Emily Golder is not a necessary party. (2 Barb. Ch. 197; *Dias v. Merle*, 4 Paige, 259; *Robinson v. Ryan*, 25 N. Y. 320; *Winslow v. Clark*, 47 id. 261; *Miner v. Beekman*, 50 id. 337;

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Hubbell v. Sibley, Id. 468; *Shriver v. Shriver*, 86 id. 575; *Howell v. Leavitt*, 95 id. 621; Code Civ. Pro. § 1632; *People v. Bacon*, 99 N. Y. 278; *Rector, etc., v. Mack*, 93 id. 488; *Seward v. Huntington*, 94 id. 104, 114; *Slattery v. Schwannecke*, 118 id. 546; *Drury v. Clark*, 16 How. Pr. 424; *Weeks v. Cornwall*, 39 Hun, 645; *Porter v. U. B. S. Co.*, 121 N. Y. 328.) The complaint does not state any cause of action in favor of the plaintiff Johnson. (Code Civ. Pro. § 841; *Ferguson v. Crawford*, 86 N. Y. 611.) The complaint does not state a cause of action against the defendant Emily Golder. (*M. A. B. Church v. O. S. B. Church*, 73 N. Y. 96; *Mickles v. Dillaye*, 17 id. 84; *Fox v. Lipe*, 24 Wend. 168; *Calvo v. Davies*, 73 N. Y. 211; *Porter v. U. B. S. Co.*, 121 id. 324.)

FOLLETT, Ch. J. It is urged in behalf of the demurrant that it does not appear upon the face of the complaint that James M. Johnson was the owner of the fee of the mortgaged premises and a necessary party to the action begun by Bates, May 19, 1880, to foreclose the first mortgage, because it is said that it is not alleged that Nanette Pontau Johnson was then dead. It is averred in the ninth subdivision of the complaint that she died in 1880, leaving a last will and testament, which was duly probated February 13, 1880, under which James M. Johnson, as it is alleged, acquired the fee of the land, subject to the amount due upon the mortgage of April 27, 1854, foreclosed by Bates. The death of Mrs. Johnson, in 1880, is alleged in positive terms, and the only inference which can be drawn from the averment that the will was probated prior to the date when the first foreclosure action was begun, is that the testatrix died before that time, and this is the reasonable and fair inference to be inferred from the allegation. This alleged defect would have been barely a sufficient ground to support a special demurrer under the practice existing prior to the Codes, but under the present practice, if a more precise statement was desired, the defendant should have moved that the complaint in this particular be made more definite and certain. (*Marie v. Garrison*, 83 N. Y. 14; *Lorillard*

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v. *Clyde*, 86 id. 384; *Milliken v. Western U. T. Co.*, 110 id. 403.)

The more serious question is whether sufficient facts are stated in the complaint to entitle the plaintiffs to a judgment against the demurrant for an accounting. It is alleged that Louisa E. Bates and Henry W., her husband, executed February 10, 1885, a fraudulent mortgage to Emily Golder for \$2,500, which was afterwards foreclosed by her, and that the premises were bid in and conveyed to Samuel F. Cowdrey, one of her attorneys of record in that action. It is also averred that Mrs. Golder, Henry W. Bates, Louisa E. Bates and Samuel F. Cowdrey have collected the rents of the premises amounting to more than \$600 annually, which, as alleged, are largely in excess of the amounts due on both mortgages. By the demurrer Mrs. Golder admits these allegations, and taken in connection with the other averments in the complaint, we think they state a cause of action for an accounting against her within the cases hereinbefore cited.

The first ground of demurrer, that two causes of action were improperly united, was not argued by the respondent, and we think that but a single cause of action is stated in the complaint, to wit.: for an accounting and a redemption of the land by the payment of the just claims of the defendants, some of whom are alleged to have acted fraudulently.

The judgment of the General and Special Terms should be reversed with cost, and leave granted to the respondent to withdraw her demurrer and answer upon the payment of the cost thereof within twenty days.

All concur.

Judgment reversed.

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156	187

132	122
78 AD	59

WILLIAM A. SCHULT, Appellant, v. CONRAD MOLL, Respondent.

The law favors a construction of a will which will prevent partial intestacy.

The fact of making a will raises a strong presumption against any expectation on the part of the testator of leaving or a desire to leave any portion of his estate beyond the operation of his will.

In an action to recover back moneys paid upon a contract to sell real estate the following facts appeared: In 1876, one H. died seized of the premises in question. At that time he was living with one B. as his wife. R., to whom B. had been married, was then alive, but had obtained a divorce from her, the decree in which forbid her remarriage during his life-time. B. had one daughter W., of whom R. was the father, and another daughter C., of whom H. was the father; the latter left no heirs at law. H. devised one-third of his real estate to his "adopted daughter" W., one-third to his "daughter" C., and one-third to his "wife" B., adding "that is to say, her dower right to my estate;" he conferred upon his "wife" B., with his executor, power to sell his real estate, and provided that the proceeds should be deposited by them in a savings bank until his "above-named children" arrived at the age of twenty-one, when they were to receive their interest of one-third of the money deposited therein. H. then devised to his "wife" the rents and interests of his estate during the minority of his "children." B. died intestate a few months after H. C. died within a year thereafter, aged two years, leaving no relatives on her mother's side except a grandmother and her half sister W. Subsequently, in a proceeding for the sale of infant's real estate, the interest of W. was sold to defendant. *Held*, that under the will, B. was vested with the fee of one-third of the real estate; that upon her death, C. and W. each became vested with an undivided one-half; that upon the death of C., her undivided one-half passed to W.; and so, that defendant had a good title.

(Submitted February 5, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 23, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This was an action to recover back moneys paid by plaintiff under a contract for the purchase by him of defendant of certain real estate on the ground of defect of title. The judg-

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ment denied the relief sought and directed specific performance on the part of plaintiff.

The facts, so far as material, are stated in the opinion.

Moffett & Kramer for appellant. It is not the province of the court to conjecture what the testator meant, but only to determine the meaning of his words, the intention of the testator, which is to be derived from the language employed in the will itself. (*Campbell v. Beaumont*, 91 N. Y. 467; *Byrnes v. Stilwell*, 103 id. 458.) When a testamentary provision admits of two constructions, the one which would render it legal and operative and in harmony with the law should be adopted. But this rule only applies to cases where the parts are inconsistent and cannot be reconciled and where there is an absence of any clear expression to the contrary; it is never adopted except as a last resort to be availed of when all efforts to reconcile the inconsistency by construction have failed. (*DuBois v. Ray*, 35 N. Y. 175; *Roseboom v. Roseboom*, 81 id. 357; 52 id. 20, 21; 16 id. 84; 2 Paige, 122; 2 N. Y. 73; 39 id. 39, 83; 63 id. 52; 1 Bosw. 223.) The purchaser is entitled to a clear title, free of encumbrances, where he agrees to pay the full value of the property. (*Burnell v. Jackson*, 5 Seld. 533; *Bostwick v. Beach*, 103 N. Y. 421.)

Jacobs & Butcher for respondent. The title to the real estate in question is marketable and good. (2 Redf. on Wills, 442; *Lyman v. Lyman*, 22 Hun, 263; *Vernon v. Vernon*, 53 N. Y. 361; *Byrnes v. Baer*, 86 id. 218; *Provost v. Calyer*, 62 id. 545.) The will contained words sufficient to carry the fee. (1 R. S. 748, § 1.) It is well settled, that where a will contains language sufficient for a fee, the devisee's interest will not be restricted or cut down to any less estate by ambiguous words inferential in their intent. (*Clark v. Leupp*, 88 N. Y. 281; *Road v. Watson*, 54 Hun, 85; *Oothout v. Rogers*, 59 id. 97; *Crain v. Wright*, 114 Hun, 310.) The reasonable supposition is that the testator intended to fully recognize Babetta as his wife, and to give her absolutely what would

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otherwise have been her's only for life, at the same time confining her interest to the third thus devised, as otherwise the wife would be entitled to dower in the whole estate. (*Konvalinka v. Schlegle*, 104 N. Y. 125; 1 Jarman on Wills [5th Am. ed.], 53, 60, 109; *Lawton v. Corleis*, 127 N. Y. 100; *Vernon v. Vernon*, 53 id. 351.) Reinig had no right of curtesy, as Babetta was not seized until after the marriage relation had been dissolved. (*Kade v. Lamber*, 16 Abb. [N. S.] 288; *In re Ensign*, 37 Hun, 152; *Luhrs v. Einer*, 80 N. Y. 171.)

PARKER, J. The complaint averred the making of a contract for the purchase and sale of lands; the payment of \$500 on account of the purchase-price by the plaintiff; the failure of the defendant, the other party to the contract, to perform, and demanded judgment for the installment paid, and the expense incurred in making a search.

The answer admitted the making of the contract; denied performance on plaintiff's part; alleged ability to perform and a proffer of performance on the part of the defendant and demanded judgment; that the contract be specifically performed.

John Hablawitz was formerly the owner of the premises in question. He died in February, 1876, leaving a last will and testament, by which he devised his estate as follows: "To my adopted daughter, Wilhelmina Hablawitz, one-third of my real estate; to my daughter Catherine Hablawitz, one-third of my real estate; to my wife Babetta Hablawitz, one-third, that is to say, her dower right to my estate."

Whether the defendant's title is good and marketable depends upon the answer which must be given to this inquiry: Did the devise to Babetta vest in her the fee of an undivided one-third of testator's real estate, or only a life estate therein? How this question comes to be controlling may be briefly stated. Babetta Hablawitz was not the lawful wife of the testator, as she had formerly been married to one John Reinig, who obtained a judgment of absolute divorce against her,

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which contained the usual restriction against her re-marriage during the life-time of Reinig, who was still living at the time of testator's death.

The testator and Babetta lived together as husband and wife, during which time Catherine Hablawitz was born. Wilhelmina Hablawitz, mentioned in the will as the adopted daughter of the testator, was the child of John and Babetta Reinig, born in lawful wedlock.

Babetta died intestate a few months after the death of John Hablawitz. Catherine died within a year thereafter, aged two years, leaving no relatives on the putative father's side, and only her maternal grandmother and the half sister Wilhelmina on her mother's side.

Subsequently proceedings were instituted under the statute authorizing the sale of infants' real estate, which resulted in a conveyance of Wilhelmina's interest in the real estate to this defendant. The regularity of these proceedings are not brought in question, so if Babetta acquired under the will the fee of an undivided one-third, upon her death such one-third descended to her daughters Wilhelmina and Catherine, in equal shares, each of whom thereupon became vested with the undivided one-half of such real estate, and upon the death of Catherine her undivided one-half passed to her half sister Wilhelmina, who thereupon became seized in fee of the whole of said premises. (1 R. S. 753, § 14; Laws 1855, chap. 547; *Bollermann v. Blake*, 24 Hun, 187.)

We are thus brought to a consideration of the question whether by the devise of Babetta, she became vested with a fee or a life estate.

It may be conceded at the outset that the language of the devise standing alone is capable of either construction, and in determining which of the two is required by the will, the court may invoke the aid of the rule which commands that effect shall be given, if possible, to the manifest intention of the testator. The intention which is to be derived from the language employed in the will may be interpreted in the light of the surrounding circumstances.

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It may be observed, in the first place, that the testator left no heirs at law, and that had he died intestate as to any portion of his estate, it would have escheated to the state, and no circumstances are disclosed which would indicate such a desire on his part. That he intended fully to recognize the claims of Babetta whom he called his wife, upon him, is apparent from the general scheme of his will.

Wilhelmina, whom he describes as his adopted daughter, was in no way connected with him by ties of blood, but was the daughter of his wife by her divorced husband, and yet he devises to her one-third of his estate, the same proportion as that given to Catherine whom he speaks of as his daughter and who was born while testator and Babetta were living together as husband and wife.

There remained yet one-third, and as to it his will continues "to my wife Babetta Hablawitz one-third, that is to say her dower right, of my estate." In view of the disposition made of the other two-thirds by which he provided for the children of his wife, coupled with the fact that he had no heirs to take lands as to which he should die intestate, it would seem as if he must have intended that she should have the other one-third which he may have understood to be a wife's portion. But knowing that she was not his lawful wife he declares her to be such and characterized the gift in language indicating that he regarded her as sustaining that relation towards him.

That he intended to give Babetta and her daughters his entire estate, has support in the other provisions of the will. After the devise to Babetta the will continues "and I give to my wife Babetta Hablawitz in conjunction with the below-named executor, full power to sell and transfer my real estate for the best price they can obtain, and the money received from such sale or sales to be deposited in a savings bank by my wife and the below-named executor, until my above-named children arrive at the age of twenty-one years, then they receive their interest of one-third of the money deposited therein. And I further devise to my wife the rents and interests of my estate during the minority of my children."

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It will be observed that he confers upon Babetta, in conjunction with the executor a power of sale as to all the real estate of which he died seized, and directs them to deposit the proceeds in a savings bank, until the children reach their majority. Until which time he gives the rents, and interest of the entire estate to Babetta.

We have thus referred to the language of the will, and briefly to the surrounding circumstances, which may properly be employed in its interpretation, and they seem to strongly indicate, that it was the intention of the testator to vest the fee of an undivided one-third of his real estate in Babetta. One of the facts alluded to has been given prominence in repeated adjudications involving the question of intent. We refer to the fact that if Babetta did not take a fee then as to an undivided one-third of the estate, testator died intestate subject to a life estate.

The law favors a construction which will prevent partial intestacy. Redfield in his work on wills says "the courts have for a long time inclined very decidedly against adopting any construction of wills which would result in partial intestacy unless absolutely forced upon them. This has been done partly as a rule of policy perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator, for the fact of making a will raises a very strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of his will." (Vol. 2, p. 442.)

This proposition has also received attention in *Lyman v. Lyman* (22 Hun, 263); *Vernon v. Vernon* (53 N. Y. 351-361); *Provoost v. Calyer* (62 N. Y. 545) and *Byrnes v. Baer* (86 N. Y. 210-218).

If the words "that is to say her dower right" were omitted the devise would unquestionably carry the fee. For the reasons already given the conclusion is reached that they were not employed for the purpose of restricting or cutting down the estate and the clause should accordingly be read as devising to Babetta the fee of an undivided one-third of testator's real estate.

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As the question presented involves only the construction of a written instrument, no reason suggests itself for refusing to decree specific performances.

The judgment should be affirmed.

All concur.

Judgment affirmed. _____

In the Matter of OSCAR STRASBURGER, an Adjudged Lunatic.

The lunacy of a lessor does not discharge or affect his covenants in a lease executed before he was adjudged a lunatic; his estate, in the hands of a committee, will be liable for whatever damages his lessees have sustained because of a breach of a covenant for quiet enjoyment, and to the extent of such damages they are general creditors, and entitled to have their claim ascertained and paid in due course of administration. The committee, however, owes no duty to the lessee of specific performance of the lunatic's covenants, and when the estate is chargeable with damages consequent upon their breach, it is entitled to the protection which the law extends to innocence in measuring such damages.

In the absence of fault upon the part of a lessor, the lessee can recover for a breach of a covenant of quiet enjoyment only such rent as he has advanced, and such *mesne* profits as he is liable to pay over.

S., who was the lessee of a building in the city of New York, sublet portions thereof to S. & A. D., which they in turn sublet to solvent tenants at largely advanced rentals. S. was thereafter adjudged a lunatic, and a committee appointed of his estate, which was insolvent. The D.'s made a payment of a quarter's rent in advance to the committee. The rent under the lease to S. not having been paid, he instituted summary proceedings to recover possession, and all the sub-tenants were dispossessed. Thereafter the committee, under order of the court, refunded to the D.'s the proportion of the rent so paid in advance for the portion of the quarter unexpired at the time of the dispossession. Upon a claim presented by the D.'s against the estate for damages, *held*, that they were entitled only to nominal damages.

Reported below, 56 Hun, 164.

(Argued February 5, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 14, 1890, which affirmed a judgment disallowing a claim against the estate of Oscar Strasburger, a lunatic, for

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damages to the claimants caused by their being dispossessed of premises leased to them by the lunatic.

Oscar Strasburger was adjudged a lunatic prior to September 17, 1884. On that day Albert Strasburger was appointed committee of his estate and qualified, and thereafter assumed to discharge his duties as such committee. January 15, 1885, Albert Strasburger, having tendered his resignation, Eustace Conway was duly appointed such committee in his place, and he qualified and entered upon his duties as such committee. February 6, 1882, and December 6, 1883, Oscar Strasburger, by written leases, leased to the appellants the first, third, fourth and fifth lots of the building known as numbers 50, 52 Howard street and 16 Mercer street in the city of New York, for terms expiring February 1, 1886, at the annual rental of \$4,500 per year. The appellants entered into possession of said premises under said leases, and before September 20, 1884, sublet them in several parcels by written leases to various parties at rents aggregating \$7,700 per year for the entire term of their leases from Strasburger, except a small parcel which was orally rented for one year at \$100 rent. All the under tenants of the appellants were in possession of their respective parcels and all were solvent. Strasburger was himself the tenant of the owner of the entire building and premises aforesaid under a lease whereby he had agreed to pay his landlord \$10,500 yearly rent. After Strasburger was adjudged a lunatic and while Albert Strasburger was committee of his estate, the rent falling due November 1, 1884, to the owner of the premises was not paid. Albert Strasburger, as committee, however, demanded payment of the appellants of the rent in advance November 1, 1884, for the quarter ending February 1, 1885, and they paid it to him. Prior to November 20, 1884, the owner of the premises and landlord of Oscar Strasburger instituted summary proceedings for non-payment of rent, and made the appellants and their under tenants parties to the proceeding. Judgment of dispossession was rendered, and on November 20, 1884, the appellants and their under tenants were all dispossessed.

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The difference between the rent paid by the appellants and that received by them from their under tenants was \$3,200 per annum, amounting from November 20, 1884, to the end of their term, February 1, 1886, to \$3,831. The rental received by the appellants from their sub-tenants was reasonable. The estate of the lunatic is insolvent.

After their dispossession the Special Term, upon the application of the appellants and upon proceedings duly taken, directed the committee of the lunatic to refund to the appellants such portion of the rent paid by them to him November 1, 1884, in advance, as was for the unexpired portion of the quarter, at the time of their dispossession, and the committee repaid the same to the appellants.

After the last mentioned order, but before payment under it, Eustace Conway, as committee of the estate of the lunatic, pursuant to an order made by the Special Term, upon his application, gave notice to all the creditors and persons having claims against the lunatic or his estate to present the same, etc. The appellants presented this claim. Such proceedings were had that afterwards an order was made referring all claims to a referee, and thereupon this claim among others duly came to a hearing before the referee and the facts as above stated appeared and were found.

It also appeared by the evidence taken before the referee that before the owner of the premises took the proceedings for dispossession he told the appellants he would, upon payment of the rent in default, if the committee of the lunatic would consent, substitute the appellants as his tenants in place of the lunatic; that one of the appellants and the agent of the owner then visited the committee and asked him to pay the owner the rent due November 1, 1884, and refund to the appellants the rent paid by them in advance to February, 1885, and allow the appellants to assume the tenancy of the entire premises as from November 1, 1884, and conclude an agreement with the owner to that effect. The committee refused his consent and the proceedings to dispossess followed.

The appellants' claim for damages was disallowed.

Opinion of the Court, per LANDON, J.

Joseph Fettretch for appellants. The rule of damages is the difference between the yearly value of the premises and the rent reserved. (*Trull v. Granger*, 4 Seld. 115; *Dodd v. Nakes*, 114 N. Y. 265.) The damages sustained by the appellants are the result of a breach of a contract, but which breach was the personal act of the committee, and the committee must be sued personally. (*In re Otis*, 101 N. Y. 583.) In the instance of an absolute and general contract the performance is not excused by an inevitable accident or other contingency, although not foreseen by or within the control of the party. (*Harmony v. Bingham*, 2 Kern. 99-115. *Tompkins v. Dudley*, 25 N. Y. 275¹)

Eustace Conway for respondent. Albert Strasburger individually is responsible to appellants (if anyone) for exceeding his authority, at all events not the lunatic's estate. (*People v. Tax Comrs.*, 100 N. Y. 215; *In re Otis*, 101 id. 585; *Peck v. Ingersoll*, 7 N. Y. 528.) A tenant evicted by a superior landlord is not entitled to pecuniary damages as against his immediate landlord, in the absence of fraud or bad faith. (*Mack v. Patchin*, 42 N. Y. 171; *In re Otis*, 101 id. 580; *Cockroft v. N. Y. & H. R. R. Co.*, 69 id. 201; *Noyes v. Anderson*, 1 Duer, 342; 1 Sedg. on Dam. 320; *Statts v. Ten Eyck*, 3 Caines, 111; *Armstrong v. Percy*, 3 Wend. 540; *Kinney v. Watts*, 14 id. 38; *Burr v. Stanton*, 43 N. Y. 467; *Walton v. Meeks*, 120 id. 79; *Trull v. Granger*, 8 id. 115.)

LANDON, J. The lunacy of Strasburger did not discharge or affect his covenants in the leases to the appellants. (*Matter of Otis*, 101 N. Y. 580.) His estate is liable for whatever damages the appellants have sustained because of the breach of the covenant for quiet enjoyment in the leases given to them by him. To the extent of such damages, they are general creditors and entitled to have their claim ascertained in order to be paid in the due course of administration. (Id.) But the question is, what is the measure of their damages? The appellants claim that it is the value of the unexpired term,

Opinion of the Court, per LONDON, J.

less the rents reserved. This would be so if the breach of the covenants for quiet enjoyment resulted from the fault of Strasburger. (*Mack v. Patchin*, 42 N. Y. 167.) But the general rule is, in the absence of fault in the lessor, that the lessee can recover only such rent as he has advanced, and such mesne profits as he is liable to pay over. (Id.; see *Walton v. Meeks*, 120 N. Y. 79.) The committee has already repaid the appellants the rent advanced by them upon the portion of the quarter beyond their actual occupancy, and there were no mesne profits which they were liable to pay over. If Strasburger had been sane and had refused to pay the rent to his superior landlord, and thus had refused to protect his covenants with the appellants, the damages for the breach would have been measurable by the rule first stated. But he became a lunatic and the breach followed from his misfortune, not his fault.

It is urged that his committee ought to have paid the rent, and thus have protected the lunatic's covenants. But why should the committee pay it? The estate was insolvent, and it does not appear that it was for its interest to make the payment. It might be better for the estate to incur whatever damages might result from the breach of the covenants than to expend the money necessary to protect them. The appellants could themselves have protected their possession by paying the superior landlord the rent due him. (*Peck v. Ingersoll*, 7 N. Y. 528.) The committee takes no title to the lunatic's estate; he is a mere bailiff to take care of it and administer it under the direction of the court. (*Matter of Otis, supra*; *People ex rel. Smith v. Commissioners of Taxes*, 100 N. Y. 215.) He owed no duty to the appellants of a specific performance of the lunatic's covenants, and when the estate became chargeable with damages consequent upon their breach, the estate was also entitled to the protection which the law extends to innocence in measuring such damages. Indeed, the burden was upon the appellants to prove the facts which would take this case out of the general rule of damages, and bring it within the exceptions. The burden has not been suc-

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cessfully borne. The appellants were only entitled to nominal damages.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

SIDNEY S. CROSS, Respondent, v. THE NATIONAL FIRE INSURANCE COMPANY, of New York City, Appellant.

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A contract of insurance, being an indemnity against an uncertain event, which, if it occurs, will cause loss to the assured, the latter must have such an interest in or relation to the insured property, that he will sustain a loss from the peril insured against.

An applicant for insurance is not bound to disclose the nature or extent of his interest to the insurer unless requested so to do; such interest may be shown by parol.

In an action upon a policy of insurance issued by defendant upon certain premises to plaintiff, as "trustee," the following facts appeared: The premises had been conveyed to plaintiff to sell and distribute the proceeds as specified; he orally agreed, on receipt of the conveyance, to take possession of, care for, rent and keep the premises insured. Defendant's general agent, who issued the policy, knew that the premises were vacant and unoccupied, having personally examined the buildings and had notice of plaintiff's title; he asked for no information and no representations were made to him. The policy provided that it should be void if the insured was not the sole and unconditional owner, or if the buildings were not on ground owned by him in fee, or if they should remain vacant or unoccupied. *Held*, that plaintiff had an insurable interest; and that the conditions as to plaintiff's title and the premises remaining vacant and unoccupied must be deemed to have been waived.

(Argued February 5, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action upon a policy of insurance against fire issued to the plaintiff as "trustee."

The firm of Daniels & Mack were originally the owners of

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the insured property. The firm being insolvent made a general assignment to John E. Pound, and subsequently having been adjudicated bankrupts, John T. Joyce was made the assignee in bankruptcy of the individual members of the firm. Millard J. Daniels died in 1877, and John Hodge and Howard W. Helmer were administrators of his estate, and as such were the creditors of Daniels & Mack in the sum of \$20,000. In consideration of this indebtedness the assignee aforesaid conveyed the real estate on which the buildings insured were situated, to Hodge & Helmer, as administrators, and in May, 1886, said administrators having substantially settled all matters relating to their trust and having no property in their possession except said real estate, conveyed it to the plaintiff in trust to sell it within two years for not less than \$2,000, and after deducting a commission of five per cent, to distribute the proceeds of the sale among the heirs of their intestate, and upon receiving said conveyance plaintiff orally agreed with the administrators to take possession of the property, care for it, rent it and keep it insured. Pursuant to that agreement the insurance in question was effected.

Further facts appear in the opinion.

I. N. Ames for appellant. The trial court erred in not nonsuiting the plaintiff. (R. S. 5289, § 6; *Newton v. Branson*, 13 N. Y. 594; *Lahens v. Dupasseur*, 56 Barb. 266.) The administrators could not delegate their powers or transfer their trust to the plaintiff Cross. Therefore, it follows that the plaintiff's contract with the defendant insurance company is wholly void. (*Coleman v. Beach*, 97 N. Y. 545.) An administrator more especially takes neither estate, title or interest in the realty of his intestate. (9 Ia. 267; 32 Me. 244; 15 Wis. 684; 57 Ind. 42; 1 Cush. 105; *Allen v. De Witt*, 3 N. Y. 276; *Pendleton v. Fay*, 2 Paige, 202.) If the title given to the administrators by the deeds was for the purpose of putting the title in the administrators so they could sell and dispose of the real estate to pay William J. Daniels' debts, when that was done all their power over the same was

Opinion of the Court, per BROWN, J.

at an end. But under the evidence or lack of evidence they had no title in or to the real estate. (Story on Agency [3d ed.], § 13.) Defendant is not bound by the acts of its agent because the plaintiff knew he was deceiving defendant. (*N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 14 N. Y. 85; *U. Ins. Co. v. T. Ins. Co.*, 17 Barb. 132; *Murray v. Beard*, 102 N. Y. 505; *Clafin v. F. Bank*, 25 id. 293; *Halpin v. P. Ins. Co.*, 28 N. Y. S. R. 788.) Plaintiff has no right to claim a waiver of the condition of the policy respecting the vacancy. (*Walsh v. H. Ins. Co.*, 73 N. Y. 5; 39 Hun, 178; 85 N. Y. 278; 70 Wis. 1.)

A. K. Potter for respondent. The title of plaintiff, or his relation to this property, was such that insurance upon the property by him under the name of "Sidney S. Cross, trustee" was good and valid. (2 R. S. chap. 1, tit. 2, art. 2, §§ 75, 94; *Kline v. Q. Ins. Co.*, 7 Hun, 267; 69 N. Y. 614; *Stilwell v. Staples*, 19 id. 401; *Waring v. I. F. Ins. Co.*, 45 id. 606; *Sturm v. A. M. Ins. Co.*, 63 id. 77; *People v. L. & L. & G. Ins. Co.*, 2 T. & C. 268; Code Civ. Pro. § 449.) The agent of the company having inspected the premises himself and relied upon his own observations without any statement by plaintiff, and the proof to that effect being undisputed, the court was right in holding that defendant could not avail itself of the provision against the building remaining vacant or unoccupied more than ten days as a defense. (*Short v. H. Ins. Co.*, 90 N. Y. 16; *Haight v. C. Ins. Co.*, 92 id. 51; *Bennett v. A. Ins. Co.*, 106 id. 243; *Vanderhoef v. A. Ins. Co.*, 46 Hun, 333.)

BROWN, J. A contract of insurance is intended as an indemnity against an uncertain event, which if it occurs will cause loss to the assured.

The assured must, therefore, have some interest in or have such a relation to the insured property that he will sustain a loss from the peril insured against, otherwise the policy would be a wager which the law condemns.

Opinion of the Court, per BROWN, J.

The courts of this state are disposed to maintain policies where the assured has an insurable interest, and when that fact appears their validity will be determined by the conditions of the contract.

The party applying for insurance is not bound to disclose the nature or extent of his interest to the insurer unless requested.

It may be shown by parol to exist, and the company must pay its value to the extent of the amount named in the policy. (*Crowley v. Cohen*, 3 B. & Ad. 478; *Kernochan v. N. Y. Bowery Ins. Co.*, 17 N. Y. 428.)

The learned counsel for the appellant has argued several interesting questions relating to plaintiff's title to the land and the effect of the conveyance from the assignee of Daniel & Mack to the administrators, and from the administrators to the plaintiff. We do not deem it necessary to consider these questions. With the distribution of the fund arising from the insurance, the defendant has no concern, and it has none with the legal title to the land any further than it may be made applicable to the case by the conditions of the contract. While the policy contains the usual conditions declaring it void if the plaintiff was other than the sole and unconditional owner, or if the buildings were on ground not owned by the insured in fee simple, or if it should become or remain vacant or unoccupied for ten days, the court held that these conditions were waived, and the evidence clearly supported that conclusion.

The plaintiff's son was the general agent of the defendant, and personally examined the buildings before issuing the policy, and knew that they were vacant and unoccupied. He also had notice of the nature of the title, and the policy described the plaintiff as a "trustee." No information was requested of the plaintiff, and he made no representation at all to the agent, and there being no claim of collusion, the defendant was bound by the contract, even if it was deceived by its agent as to the condition or title of the property.

The only question of importance in the case, therefore, is as to the plaintiff's insurable interest.

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This he could have without any legal or equitable title in the land, and hence it is not important to discuss the effect of the conveyance referred to.

He had agreed for a consideration to take possession of the property and care for it, rent it and keep it insured.

There was a possible liability which might arise out of that agreement which created in him an insurable interest to the extent of the value of the buildings, and the case falls within the principle of numerous and well recognized authorities, a few of which are cited. (*Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity F. Ins. Co.*, 45 id. 606; *Sturm v. A. M. Ins. Co.*, 63 id. 77; *Kline v. Ins. Co.*, 7 Hun, 267; 69 N. Y. 614; *Berry v. Central Ins. Co.*, Ct. App. 2d Div. March, 1892, and cases cited.)

No other questions require consideration.

The judgment should be affirmed.

All concur.

Judgment affirmed. _____

JERRY PETRIE, Respondent, v. THE PHENIX INSURANCE
COMPANY of Brooklyn, Appellant.

O. & Co., who were insurance brokers and defendant's agents, issued to P., a forwarder in New York city, a "Uniform Canal Cargo Policy" of insurance, by which defendant agreed to insure the several persons whose names were indorsed thereon, or in a book provided for that purpose; no risk to be considered as insured unless the indorsement was approved and signed by the company or its authorized agents. A book was delivered with the policy, ruled in columns with printed headings, one being "Signature of Approval." In an action upon the policy, plaintiff's evidence was to the effect that by the course of business between P. and O. & Co., a cargo to be insured was entered by P. in this book, which was sent to O. & Co. for their approval. When the risk was taken for "the harbor of New York," the approval was denoted by the word "harbor" written in that column opposite the name of the assured and the boat or vessel insured. P., having loaded a canal boat, entered in said book the name of the boat, description of cargo, etc., and sent it to O. & Co., who wrote the word "harbor" in said column. Defendant's evidence was to the effect that the word "harbor" indicated an acceptance of the risk by insurers other than defendant, but that the

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insured had not been advised that such risks were not taken by defendant, and the insured had no other open policy or book. *Held*, that the evidence justified a finding that the risk was accepted by defendant.

It appeared that during the season when this risk was taken, which was upon a cargo of cement, P. had been engaged in forwarding cargoes of cement to various points in the upper part of the harbor of New York, on the Harlem river and at Tarrytown. All of these cargoes had been insured through O. & Co. under the policy in question. In such cases the places of destination were not entered, but under columns in the book headed "from" and "to," the shipments were indicated by the words "from New York to harbor." Opposite the name of the boat in question in the column "from" was written, "from New York harbor," the last word extending into the column headed "to." *Held*, that, under the circumstances, the contract was not so indefinite and uncertain as to render it void.

The cargo in question was shipped to Tarrytown. Evidence on behalf of plaintiff was offered and received to the effect that the term "harbor of New York," as used in the business of insurance, included Tarrytown and other points in the New York custom-house district. *Held*, that the evidence was competent.

The canal boat arrived safely at Tarrytown and was moored alongside a dock; when the tide went out it grounded and was so injured that it sank and the cargo was destroyed. It appeared that the boat was seaworthy when laden. The perils insured against were "of the seas, canals, rivers," etc. *Held*, that the loss was within the perils insured against.

Berwind v. G. Ins. Co. (114 N. Y. 231), distinguished.

(Argued February 5, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover for the loss of a cargo of cement underwritten by defendant.

April 26, 1886, the defendant issued to Sherman Petrie an open uniform canal cargo policy, by which it undertook to "insure the several persons whose names are hereafter indorsed hereon as owner, advancer or common carrier on goods * * * on his own boat, or boats belonging to others, loaded on commission or chartered. From place to place, as indorsed

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hereon, or in a book kept for that purpose, at the rate and on the goods * * * as specified in the said indorsement." The policy contained these clauses: "No risk considered as insured under this policy until said indorsement is approved and signed by this company, or its duly authorized agents, at New York, unless with special agreement with the company and indorsed hereon.

"Beginning the adventure upon the goods * * * from and immediately following the lading thereof, at the port or place, indorsed as aforesaid, and continue the same until the said goods * * * shall be safely landed at the port of destination as aforesaid.

"Touching the adventures and perils which the said insurance company is contented to bear and take upon itself on said trip or voyage, they are of the seas, canals, rivers and fires, and all other perils, losses or misfortunes that shall come or happen to the hurt, detriment or damage of the said goods * * * laden on board of said boats on the voyage or trip aforesaid," excepting certain perils and losses which do not include the misfortune which happened to the boat in question.

It was also provided in the policy that in case of loss "and within thirty days from the time the same may happen, the said insured shall deliver to said company as particular an account thereof as the nature of the case will admit." Also, "that no suit or action against this company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the time of twelve months next after such loss or damage shall occur."

With the policy a book was delivered to the insured, ruled in columns and having the following printed headings:

"Date; Account of; Vessel or Boat; From; To; Cargo; Amount; Premium; Signature of Approval."

Sherman Petrie was a forwarder engaged in business at 142 Broad street, New York. W. M. Onderdonk & Co. were insurance brokers, agents of defendant, and engaged in business at Nos. 1 and 3 Beaver street, New York. By the course

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of business between Petrie and W. M. Onderdonk & Co. the cargoes laden on boats were entered by Petrie or his clerk in this book, which was sent daily to W. M. Onderdonk & Co., and they approved or disapproved of the risk so offered. Their approval was indicated by entering in the column headed "Signature of Approval" the number of the page of their own book in which the risk was entered. This was the usual form of approval, but when risks were taken for "the harbor of New York" the approval of the agents was denoted by the word "harbor" written in the column headed "Signature of Approval."

The premiums were fixed by the insurance agents and charged to Petrie, who paid them monthly. October 17, 1887, Petrie loaded the canal boat "C. L. Abel" with one thousand barrels Portland cement, and on that day entered in the columns of his insurance book: "Date, Oct. 17, 1887; Account of Sherman Petrie; Vessel or Boat, C. L. Abel; From New York harbor; To blank (except as the word 'harbor' extended into that column); Cargo, cement; Amount, \$2,500; Premium, no entry; Signature of Approval, no entry," and sent the book to W. M. Onderdonk & Co. on the same or the next day, and thereupon they wrote the word "harbor" in the column headed "Signature of Approval," and returned the book to Petrie. The boat left Brooklyn October 19, 1887, and reached Tarrytown, its destination, the next morning, where later in the day it sank at its dock. The sinking was caused by the tide going out and grounding the boat at about its center, which caused it to break in two, so that it filled with water and destroyed the cargo. This action was brought December 1, 1888, to recover this loss. The defenses interposed were: (1) That the defendant did not insure the risk. (2) That a valid contract to insure was not entered into because the duration of the risk was neither measured by time nor termini of the voyage. (3) That the loss was not occasioned by the perils insured against. (4) That proofs of loss were not furnished within thirty days. (5) That the action was not begun within twelve months after the happening of the loss.

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Joseph F. Mosher for appellant. The risk was never approved by the defendant or its agents, and the motion to dismiss on this ground was improperly denied. (*Hortshorn v. S. & L. D. Ins. Co.*, 15 Gray, 240.) The court erred in charging the jury that if, as claimed by Petrie, the entry in the open policy book, "simply stated that the point of departure was from New York harbor, and did not specify where the voyage was to terminate, if the defendant chose to accept such a risk, it was within their power to do so," and the insurance was valid; and the exception to this part of the charge was well taken. (*Abeel v. Redcliff*, 13 Johns. 287; *Roland v. Pickett*, 2 Hill, 552; *B. Church v. B. F. Ins. Co.*, 28 N. Y. 153; *Manley v. U. M. & F. Ins. Co.*, 9 Mass. 85; *Tyler v. N. A. F. Ins. Co.*, 4 Robt. 151; *De Grove v. M. Ins. Co.*, 61 N. Y. 594, 601, 602; *Clark v. Brand*, 62 Ga. 23; *Strong v. H. F. Ins. Co.*, 37 Wis. 625; *Schaefer v. B. M. Ins. Co.*, 33 Md. 109.) The court erred in excluding the question asked the witness Baker, as to what the words "New York" and "harbor" in the entry of the risk would indicate to an insurance man as to the terminus of the risk. (*Nelson v. S. M. Ins. Co.*, 71 N. Y. 453; *Bissill v. Campbell*, 54 id. 353; 1 Phil. on Ins. [5th ed.] § 144; *Astor v. U. Ins. Co.*, 7 Cow. 202; *Child v. S. M. Ins. Co.*, 3 Sandf. 26; *Dow v. Whitton*, 8 Wend. 160.) No loss within the perils insured against was proved, and the motion for a nonsuit on that ground was improperly denied. (*Van Wickle v. M. & T. Ins. Co.*, 97 N. Y. 350; 16 J. & S. 95; *Wright v. O. M. Ins. Co.*, 6 Bosw. 269; 97 N. Y. 354; *Berwind v. G. Ins. Co.*, 114 id. 231; *Talcott v. C. Ins. Co.*, 2 Johns. 124; *Prescott v. U. Ins. Co.*, 1 Whart. 399, 400, 407; *Rugley v. S. M. Ins. Co.*, 7 La. Ann. 279, 282.)

Edwin G. Davis for respondent. The risk was assumed by the defendant. (*Ruggles v. A. C. Ins. Co.*, 114 N. Y. 415; *Garner v. F. F. Ins. Co.*, 35 N. W. Rep. 584; *N. F. O. Co. v. C. Ins. Co.*, 106 N. Y. 535; *Hartshorne v. U. M. Ins. Co.*, 36 N. Y. 172; *Hancox v. Fishing Co.*, 3 Sumn. 132;

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Savage v. C. E. Ins. Co., 36 N. Y. 655.) It was a valid risk and not confined to the harbor. (14 Am. & Eng. Ency. of Law, 334.) This was not a case in which the rule that "it is incumbent upon the plaintiff to prove the seaworthiness of the vessel" should apply, because the boat had reached her place of destination and the loss of the cement occurred through her stranding and straining, and no one had ever suggested anywhere that the boat was unseaworthy. (*Earnmoor v. C. Ins. Co.*, 40 Fed. Rep. 847; *Lunt v. Ins. Co.*, 6 id. 562.) Whether or no the defendant waived certain conditions of the policy was a question of fact for the jury, and upon sufficient evidence was properly submitted. (*Ames v. N. Y. U. Ins. Co.*, 14 N. Y. 253; *D. H. Ins. Co. v. Brodie*, 11 S. W. Rep. 1016; *Uhbrig v. W. C. F. Ins. Co.*, 101 N. Y. 362; *Rehberg v. Mayor, etc.*, 91 id. 137; *O'Brien v. P. Ins. Co.*, 76 id. 459; *Short v. H. Ins. Co.*, 80 id. 16; *Smith v. M. & T. Ins. Co.*, 39 id. 399; *Wyncoop v. N. Ins. Co.*, 91 id. 478; *B. F. Ins. Co. v. Pulver*, 18 N. E. Rep. 804; *Mayor, etc., v. H. F. Ins. Co.*, 39 N. Y. 46; *P. F. Ins. Co. v. Pulver*, 20 N. E. Rep. 18; *Goodwin v. M. M. L. Ins. Co.*, 73 N. Y. 480.)

FOLLETT, Ch. J. The question which meets us at the threshold of this discussion is, was the evidence sufficient to justify the submission of the question, whether the defendant's agents approved of the application for this insurance? The authority of W. M. Onderdonk & Co. to bind the defendant by indorsing in the book in any form their approval of the risk proposed is not denied. Six days before the entry in question the insured entered on the same book an application for insurance on the boat "Delia McKeever" for \$2,500 on cement, New York harbor, which was approved by writing the word "harbor" in the column designated "Signature of Approval." The insured testified that other risks were approved by the entry of the word "harbor" in the approval column. A clerk of the insurance brokers, who was sworn in behalf of the defendant, testified that he wrote the word

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"harbor" opposite this application and the same word in the same book against other applications for insurance, and that it indicated an acceptance of the risk by insurers other than the defendant. The witness also testified that he never informed the insured that the word "harbor" indicated that the risk was not taken by defendant, but by some other company, and that the insured had no other open policy and book, except these issued by defendant. The assured testified that these brokers did all of his insurance, that he always applied for it in the same way, by entering the proposed risk in this book and sending it to the agents for their approval, who usually returned certificates of insurance executed by the defendant, and that he never had received any from any other company. This state of the evidence justified the court in submitting the question of the acceptance of the risk by the defendant to the jury and its verdict must be regarded as final upon this question.

Was the contract of insurance void because the duration of the risk was not fixed by time nor for a voyage between specified places? Ordinarily, marine contracts of insurance not specifying the duration of the risk either by time or by the places at which the voyage insured is to begin and end, is void for uncertainty. (Molloy Bk. 2 C. 17, § 14; 2 Par. Mar. L. 311; 1 Phil. Ins. § 918; 1 Arn. Mar. Ins. [6th ed.] 236; *Manly v. United M. & F. Ins. Co.*, 9 Mass. 85.)

The undisputed evidence is that during the season of 1887 the assured had been engaged in forwarding cargoes of Portland cement to the contractors engaged in extending the Croton water supply, which were delivered at various points in the upper part of the harbor of New York, on the Harlem river and at Tarrytown. It was the custom of the contractors to direct the assured to load five or six thousand barrels on boats, and subsequently designate the places at which they should be unloaded. That in such cases the place of destination could not be entered in the book, and that the words "from New York to harbor" indicates such shipments. The assured also testified that all of these cargoes had been insured through

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these agents by the defendant under the policy put in evidence and by entries on the book, made as in this instance. Under such a practice an insurance on a cargo to be delivered at some place in the same port would not be so indefinite and uncertain as to render the contract void, both parties understanding what was meant by the term. Did the loss occur in that harbor? It was competent to receive evidence as to the meaning, in the business of insurance, of the term "harbor of New York." (*Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453.) Upon this issue there was evidence that the term "harbor of New York," as used in the business of marine insurance, included Tarrytown and other points within the New York custom house district. Other witnesses testified that the harbor of New York did not extend above Spuyten Duyvil, and did not include Tarrytown. This question was submitted to the jury and found for the plaintiff. No available error is presented by the ruling on the question put to the witness Baker, because he was subsequently permitted to testify as to the meaning of the words "New York to harbor," and fully as to all facts called for by the question.

It is insisted that the loss was not within the perils insured against. The evidence is that the "Abel" was loaded at the Anglo-American stores, Brooklyn, N. Y., October 19, 1887, and left that place at 8 o'clock P. M. of that day in a tow bound for Tarrytown, where it arrived at 1 o'clock the next morning. The boat was moored alongside of the dock, and when the tide went out it grounded, and was so broken or strained that it sank and the cargo was destroyed. It was testified that the boat was seaworthy when laden, which evidence was not disputed. This case does not fall within the class of cases of which *Berwind v. Greenwich Ins. Co.* (114 N. Y. 231) is a type. In that case the boat sprung a leak and sank without any known cause. It was held that this raised a presumption that it was unseaworthy, but that this presumption might have been rebutted by showing that the loss was occasioned by some other cause than the unseaworthiness of the boat. This was precisely what was done in this case.

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Whether the defendant had waived the requirement in the policy, that formal proofs of loss should be furnished within thirty days and an action brought within twelve months after a loss, was submitted to the jury and was found for the plaintiff. No point is made by the learned counsel for the appellant that the evidence was insufficient to sustain the verdict on these issues.

But two exceptions were taken to the instructions given by the court, and neither of them was argued by the learned counsel for the appellant.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

GEORGE W. COONLEY, Appellant, v. THE CITY OF ALBANY,
Respondent.

While the Hudson river is a highway for the passage of vessels, that portion of it which is embraced within the boundaries of a city is not one of its highways, so as to burden it with the duty of removing obstructions and keeping it safe for navigation.

While the state may undertake, at its own expense, to remove obstructions in, and improve the condition of navigable waters, and may impose this burden upon a city or county more immediately and beneficially interested therein than other portions of the state, in order to charge a municipality with this duty, the legislative intent so to do it must appear from the act relied upon as imposing the duty.

By various statutes in relation to the city of Albany, it is made lawful for the common council "to make by-laws and inflict reasonable penalties to enforce the same, for regulating and keeping in repair the docks and slips within the city, and to prevent the same and the river opposite thereto from being in any manner obstructed" (§ 19, chap. 153, Laws of 1801), and that body is constituted and declared commissioners of highways with power to pass ordinances, among other things, "to prevent all obstructions in the river near or opposite" the city wharves or docks. (§ 15, chap. 185, Laws of 1826.) The common council of the city passed an ordinance declaring that whenever any vessel is sunk at any dock or anywhere in the Hudson river opposite the city, it shall be the duty of the street commissioner, under the direction of the mayor, to give notice to the owner to remove it, and if the notice is not complied with, making it lawful for that officer to take possession of the vessel, remove and sell

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it, etc. Plaintiff's complaint alleged in substance that he was the owner of a dock in that city; that a loaded canal boat sank at the dock, obstructing its use; that a written notice thereof was served on the mayor, who gave written directions to the street commissioner to remove it; that officer notified the owner, but declined to remove it himself, or to do anything more in the matter, whereupon plaintiff caused the boat to be removed. Plaintiff asked to recover the expenses of such removal and his damages. Upon demurrer to the complaint, *held*, that assuming said statutory provisions were not repealed by the amended charter of 1883 (Chap. 298, Laws of 1883), which in prescribing the powers to pass ordinances, omits all mention of the river opposite the city, the complaint failed to state a cause of action; that as no duty in reference to the matter was imposed upon the city by the statute, no liability existed: (1) As by the said charter of 1883 (§ 44, tit. 3) it is provided that the city shall not be liable for a failure to enforce any ordinance; (2) As the statutes prescribe that the city shall provide for the enforcement of its ordinances by fines and penalties, and so, that portion of said ordinance which authorized the sale of the vessel, or its loading, thus creating a forfeiture, was invalid.

Reported below, 57 Hun, 327.

(Argued February 9, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 7, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The complaint alleges that the plaintiff was the owner of a dock upon the Hudson river, within the city of Albany, adapted to and valuable for the lading, unlading and storage of merchandise from vessels; that on the 26th day of September, 1888, a canal boat loaded with iron, while navigating the river, sunk at the said dock, and thereby obstructed its use to the plaintiff's damage; that the defendant assumed the duty of keeping the river free from obstructions by section 10, chapter 42 of the ordinances of the city of Albany, which reads as follows:

"Whenever any vessel, loaded or empty, shall, by accident or otherwise, be sunk at any dock, wharf or slip, or anywhere in the Hudson river opposite to the city of Albany, and within

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jurisdiction thereof, it shall be the duty of the street commissioner, under the direction of the Mayor, to give notice to the owner, proprietor or other person sailing such vessel, to remove the same within twenty-four hours, and in case the owner or proprietor is unknown, and there is no one that sails the same, to give notice in one of the newspapers printed in the city of Albany at least one week, directing the removal of such vessel as aforesaid; and if the said notice is not complied with, then it shall be lawful for the street commissioner to take possession of such vessel, craft, boat or flat, and to remove the same, and at public auction to sell such vessel, or so much of the loading thereof as will pay the expenses of such removal."

That on the 28th and 29th days of September, 1888, written notices of such facts, stating the name and owner of the boat, and requesting the removal of the same, were served upon the street commissioner and the mayor, a copy of which notice is annexed to the complaint. That on the 29th day of September, 1888, the mayor gave the street commissioner written directions to remove said boat; that said street commissioner took the preliminary steps as provided by the city ordinance, to accomplish that result, and notified the owner to remove the boat, but finally on or about the 26th day of October, 1888, declined to remove the same, or to do anything more towards that end; that thereupon plaintiff employed the firm of Payne & Co. to remove the said boat, and paid them for the work \$314.79, besides having suffered other damage to the amount of \$1,000 by reason of said sunken boat not being removed by said street commissioner within a reasonable time.

By reason of said facts plaintiff asks for judgment against the city of Albany for \$1,414.79. The defendant demurred upon the ground that the facts stated did not constitute a cause of action.

Walter E. Ward for appellant. The sunken boat was a public nuisance. (Angell on Water Courses [7th ed.] 730, 722, §§ 554, 555; *Know v. Chalmer*, 42 Me. 150; *N. P. R.*

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Co. v. Elmer, 9 N. J. Eq. 754; *State of Pennsylvania v. W. B. Co.*, 13 How. [U. S.] 518.) Plaintiff having suffered a special injury, he has a private right of action for damages. (*Brayton v. Fall River*, 113 Mass. 218, 227, 228; *Haskell v. City of New Bedford*, 108 id. 216; Angell on Water Courses, § 567; Gould on Waters, §§ 122-125; *Frinke v. Lawrence*, 20 Conn. 117; *Walker v. Sheppardson*, 2 Wis. 384; *Stetson v. Faxon*, 19 Pick. 147; *Emery v. Lowell*, 109 Mass. 197, 201; *Blanc v. Klumpke*, 29 Cal. 156.) It was not only the right, but the duty of the city of Albany to keep the river within its jurisdiction free from obstructions. (Laws of 1801, chap. 153, § 19; Laws of 1826, chap. 185, § 15; Laws of 1842, chap. 275, § 29; *Hart v. Mayor, etc.*, 9 Wend. 571, 586; *People v. Corporation of Albany*, 11 id. 593; *Winpinny v. City of Philadelphia*, 65 Penn. St. 135; *Cain v. City of Syracuse*, 95 N. Y. 83, 87; *People v. Supervisors*, 51 id. 401, 407; *Pittsburgh v. Grier*, 22 Penn. St. 54; *City of Tallahassee v. Fortune*, 3 Fla. 319; *Cooper v. Alden*, Harr. Ch. 86.) The city accepted the responsibility imposed upon it by these acts and was bound to remove the canal boat in question. (Laws of 1883, chap. 298; *Sleight v. City of Kingston*, 11 Hun, 594; *Haskell v. City of New Bedford*, 108 Mass. 216; *Franklin Wharf v. City of Portland*, 67 Me. 46, 55; *Boston R. M. v. City of Cambridge*, 117 Mass. 896; *Emery v. City of Lowell*, 109 id. 197; *O'Marra v. R. R. Co.*, 38 N. Y. 445; *Brown v. C. R. R. Co.*, 80 Mo. 467.) The corporation is liable for the neglect of the street commissioner to remove the obstruction. (*Weed v. Vil. of Ballston Spa*, 76 N. Y. 329.) It is not necessary for plaintiff to plead or prove that defendant had the necessary funds. (*Weed v. Vil. of Ballston Spa*, 76 N. Y. 335, 336; *Hines v. City of Lockport*, 50 id. 238, 239.)

John A. Delehanty for respondent. The question to be determined is, does the complaint allege facts which, if proved in-evidence or admitted, will entitle the plaintiff to judgment? If one or more such allegations of fact are wanting the defend-

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ant may demur. (*People ex rel. v. Mayor, etc.*, 7 How. Pr. 81; *Harker v. Mayor, etc.*, 17 Wend. 200.) But assuming that the ordinance was pleaded as required, yet the failure and refusal of the officers mentioned to remove the sunken boat, as alleged in the complaint, would not render the defendant liable. (*The King v. Bailiffs, etc.*, 4 B. & A. 272.) If the ordinance was sufficiently pleaded and imposed an absolute duty, the city would not then be liable, as that portion of the ordinance which it is claimed the defendant refused to enforce is void. (*Hart v. Mayor, etc.*, 9 Wend. 572; Laws of 1801, chap. 153; 17 Wend. 586; Laws of 1883, chap. 298, § 42; *Seaman v. Mayor, etc.*, 80 N. Y. 239.) Neither does the power conferred by the charter (§ 14, subd. 27, tit. 3, chap. 298, Laws of 1883), that is, to make ordinances "in relation to the construction, repairs, care and use of the markets, docks, wharves, piers, slips and squares of the city," nor do the ordinances passed in pursuance thereof render the city liable. (*Hart v. Mayor, etc.*, 9 Wend. 569; *People v. Corporation of Albany*, 11 id. 540; *Stilwell v. Mayor, etc.*, 17 J. & S. 360; *Winpenny v. Philadelphia*, 65 Penn. St. 140.) No liability can be based either upon the statute permitting the passage of ordinances regulating docks, etc., or upon the failure to enforce the ordinance passed pursuant thereto. (Laws of 1883, chap. 298, § 44.) While the boundaries of the city of Albany extend to the center of the river, and the river is a highway, the city has not the same control over, nor is it subject to the same duties in regard to it as in regard to a city street or highway. (*Seaman v. Mayor, etc.*, 80 N. Y. 239.) The plaintiff himself must keep the dock and the approaches thereto in repair. (*Leary v. Woodruff*, 4 Hun, 99; *Carleton v. F. I. & S. Co.*, 99 Mass. 216; *Newall v. Bartlett*, 114 N. Y. 403.)

PARKER, J. The defendant did not own, nor did it sink the boat. It neither caused, nor in any wise contributed towards the creation of the nuisance, therefore, *Brayton v. City of Fall River* (113 Mass. 218); *Haskell v. City of New*

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Bedford (108 id. 216); *Boston R. Mills v. City of Cambridge* (117 id. 896); *Franklin Wharf Co. v. City of Portland* (67 Maine, 46); and *Sleight v. City of Kingston* (11 Hun, 594), cited by the appellant, are not in point.

The liability if any, must be founded on a duty to keep the navigable waters of the Hudson within the city limits free from obstruction.

The obligation to keep streets and highways in a safe condition for public use, cannot be invoked against the defendant here for while the river is a highway, for the passage of vessels, that portion of it which happens to be embraced within the boundaries of a city is not one of its highways, so as to burden it with the duty of removing obstructions and keeping it safe for navigation. (*Seaman v. Mayor, etc.*, 80 N. Y. 239.)

The river being a highway for state, interstate, and foreign commerce is subject to regulation by congress, but the state because of its great interest in the continuing availability of navigable waters within its borders for vessels, may properly assume to remove such obstacles as may from time to time prove a menace to successful navigation, provided always that it does not impair freedom of navigation under the acts of congress, or interfere with any system of improvement provided by the general government.

But while the general government, together with the aid of the state government, may and generally does provide for the removal of obstacles, which are a hindrance to navigation, and the doing of other necessary things for the encouragement and protection of commerce; and performance in that respect is regarded as a duty, still it is not one that the individual may enforce. Judge AGNEW in the *Winpenny* case said "it is not a duty of perfect obligation, but one of voluntary assumption or imperfect obligation; in as much as it cannot be enforced against the will of the state."

The state may not only undertake at its expense to remove obstructions in, and generally improve the condition of navigable waters, but in its discretion it may place the burden of performance on a city or county more immediately and bene-

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ficially interested than other portions of the state. (*County of Mobile v. Kimball*, 102 U. S. 691.)

It seems to be clear, however, that in order to charge a municipality with the duty and burden of improvements primarily existing in the general and state governments, which they can perform or not as the wisdom of congress or the legislature may suggest, a determination which could not be directed or interfered with by the courts at the instance of a complaining party; that it must appear from the act alleged to contain the requirements, that it was the intention of the legislature to place upon the municipality the burden of doing all that the state should have done, and more than it could be required to do.

As we read the decision in the *Winpenny* case cited by the appellant, it is in no wise opposed to the views so far expressed. In that case the statute provided that the city should "keep the navigable waters within said city open and free from obstructions," and the court held that the duty being express the consequences of a failure to perform rested on the city. (*Winpenny v. City of Philadelphia*, 65 Pa. St. 135-140.)

If the statutes of this state laid on the city of Albany a command in the same terms as to the navigable waters within its boundaries, we should not hesitate to follow the decision in a case founded on neglect of performance resulting in injury. But quite another question would be presented if the attempt were to recover (as here in some part) for expenses incurred by the plaintiff in doing that which he alleges the city should have done.

The plaintiff decided that the city owed to the public in general, and himself in particular, the duty of removing the sunken boat, and he assumed to perform the obligation which he claimed belonged to the city and should have been exercised through its officers, and now asserts its liability to respond to him for the expense incurred.

But we need not consider this question, as we have determined to place our decision on other grounds.

It is not contended that the state expressly charged the city

of Albany with the responsibility of keeping the river free from obstructions, but that it conferred on the common council power of local legislation, to be exercised by the establishment of general rules and regulations under which such purpose could be accomplished, and having accepted charter powers from the state, of which these formed a part, the city became liable in consideration of the grant for the due exercise of the powers conferred and a proper performance of the duties imposed.

Reference is made to section 19, chapter 153, Laws of 1801, which provides "that it shall be lawful for the said mayor and commonalty to make by-laws and inflict reasonable penalties, to enforce the same for regulating and keeping in repair the docks and slips within the said city, and to prevent the same, and the river opposite thereto, from being in any manner obstructed." Also to Laws of 1826, chapter 185, section 15, which declares "that the said common council are hereby constituted and declared commissioners of highways in and for the said city, and shall and may from time to time pass ordinances * * * to abate or remove any nuisances in any street or wharf, * * * to regulate, keep in repair, and alter the streets, highways, bridges, wharves and slips, * * * to prevent all obstructions in the river near or opposite to such wharves, docks or slips."

It may be observed in this connection that the charter of Albany was amended by chapter 298, Laws of 1883, and the power to enact ordinances on the subjects now being considered was limited "to the construction, repair, care and use of the markets, docks, wharves, piers, slips and squares of the city," no mention being made of "the river opposite thereto," as in the acts of 1801-1826, and it is insisted that those acts in respect to such provision are repealed by implication.

Assuming, but not deciding, that such contention is not well founded, we come to the fact that the common council did provide by ordinance that if a vessel be sunk at any dock, wharf or slip, or anywhere in the Hudson river opposite the city of Albany, and within jurisdiction thereof, that a notice

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should be given to the owner or proprietor to remove it, and in the event of his failure to do so, "then it shall be lawful for the street commissioner to take possession of such craft, boat or flat, and to remove the same, and at public auction to sell such vessel, or so much of the loading thereof as will pay the expenses of such removal."

For failure to enforce this ordinance relating to matters which the city was not commanded by the legislature to do or perform, and in respect to which, in the absence of command, it owed no duty, no liability exists.

1. Because there being no liability in respect to the subject-matter in question, the statute exempts it from liability for the mere non-enforcement of the ordinances.

Section 44 of title 3 of its charter (Chap. 298, Laws 1883) provides: "Nothing contained in this act shall be so construed as to render the city of Albany, or any of its officers, liable in damages or otherwise to any person, or persons or corporations, for any omission to pass any ordinance, regulation or resolution pursuant to the provisions hereof, *or for a failure to enforce the same.*" In the absence of a statutory provision this rule has been enforced by the courts. (*Stilwell v. Mayor, etc.*, 17 J. & S. 360; 96 N. Y. 649; *Hines v. City of Charlotte*, 40 N. W. Rep. 335; *Wheeler v. City of Plymouth*, 18 N. E. Rep. 532; 2 Dillon M. C. § 950.)

2. So much of the ordinance as provides that the street commissioner might sell the vessel, or the loading thereof to pay the expenses of removal, was invalid, because the ordinance created a forfeiture in the face of the statute prescribing that the city should provide for the enforcement of ordinances by fines and penalties in an amount not exceeding that named in the act. (*Hart v. Mayor of Albany*, 9 Wend. 570-589.)

The judgment should be affirmed.

All concur, except LANDON, J., not sitting.

Judgment affirmed.

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NATHAN S. STARR, Appellant, v. SARAH M. STARR, Respondent, et al., Appellants.

The will of S., who died in 1856, after giving to his wife the use and income of one-third of his house and lot and of his store and lot in the city of New York, authorized and directed his executors to lease and rent that portion not devised, to pay all taxes, expenses and charges, "and to divide the residue of the income thereof" among the testator's five children during life, and after death he devised "the same to their heirs in fee forever." In settlement of a suit brought by the widow for dower, the children agreed to keep the house and store in good repair and pay to her one-third of the gross income. The executors thereafter leased both premises, paying her the one-third so agreed upon. In an action brought by a son of one of said children upon the death of his father for partition, the trial court ordered a sale and partition, and that the widow refund one-third of the taxes, repairs, etc., paid for six years prior to the commencement of the action. *Held*, error; that the testator's intention was to give the executors power to rent the whole premises, paying to the widow one-third of the income, and out of the remainder to pay all expenses; also that while the grandchildren as remaindermen might not be bound by the contract of the parents as life tenants, the construction given by them to the will and acted upon for many years would not be overturned when the provisions were reasonably capable of that construction.

Reported below, 54 Hun, 800.

(Argued February 11, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which modified by reversing a judgment of partition and for an accounting of rents, entered upon the report of a referee, so far as it imposed any liability upon the defendant Sarah M. Starr.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodore H. Silkman for appellant. The General Term erred in holding that by testator's failure to make any allusion in the fourth clause to the payment of taxes, etc., upon the one-third of the premises in question given to his widow for

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life, and by providing in the sixth clause for the payment of taxes, etc., upon the residue "being two-thirds," which the executors were authorized to lease under a trust power, an intention was sufficiently expressed to support the inference that the taxes, expenses and repairs were not intended to be divided, but were to be wholly paid out of the proceeds of the rents and profits of the two-thirds. (*Ritch v. Hauckhurst*, 114 N. Y. 512; *Graham v. Donnigan*, 3 Bosw. 516.) The General Term erred in holding that this appellant was in any way bound by the alleged agreement of compromise dated October 15, 1858. (*Sharkey v. Mansfield*, 90 N. Y. 227; *Adair v. Brimmer*, 74 id. 539.) The General Term was correct in holding that the provision contained in the fourth paragraph of testator's will was in lieu and bar of dower of the defendant Sarah M. Starr. (*In re Zahrt*, 94 N. Y. 605; *Vernon v. Vernon*, 53 id. 351; *Sullivan v. McCann*, 2 N. Y. Supp. 253; *Konvolinka v. Schlegel*, 104 N. Y. 125.) The General Term erred in not granting to the plaintiff a new trial upon reversal of the judgment of the Special Term. (*Griffin v. Marquardt*, 17 N. Y. 28; *Foot v. Ins. Co.*, 61 id. 571.)

Frederick H. Man for defendants, appellants. These appellants never assented to the payment to respondent of the amount she received. (*Adair v. Brimmer*, 74 N. Y. 539; *Duncan v. Berlin*, 11 Abb. [N. S.] 116; Code Civ. Pro. § 1589; *McCabe v. McCabe*, 18 Hun, 153.) Respondent's interest under the fourth clause of the will was an ordinary life estate in an undivided third of the property. (*Pinckney v. Pinckney*, 1 Brad. 269.) The sixth clause of the will does not enlarge the estate given to respondent by the fourth clause, or charge any of her burdens as life tenant upon any one else. (*Wylie v. Lockwood*, 86 N. Y. 291.)

Matthew Hale for respondent. Even if the will be held to intend ultimately to devise the fee as claimed by the appellants of either the whole estate or of the "two-thirds" only, this would, nevertheless, be void for creating a suspension of the

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power of alienation of the fee beyond the duration of two lives in being at the time of the creation of the trust estate. (*Field v. Field*, 4 Sandf. Ch. 528; *Ward v. Ward*, 105 N. Y. 74.) If it shall be held that the testator devised the remainder in fee of all his real estate to his grandchildren, nevertheless, the agreement of October 18, 1858, was still binding upon all of the appellants. (*U. S. T. Co. v. Roche*, 116 N. Y. 130; *Gleason v. Ketteltas*, 17 id. 495.) The payments to Mrs. Starr, the defendant and respondent, being voluntary and under a claim of right on her part, and there being no mistake of fact, the money cannot be recovered back in any event. (*Mayor, etc., v. Erben*, 3 Abb. Ct. App. Dec. 255; 24 How. Pr. 358; 10 Bosw. 189; *Flower v. Lance*, 59 N. Y. 603; *Cox v. Mayor, etc.*, 103 id. 519.) The money could not be recovered from her until after specific demand made before this suit. None ever was made. (*Southwick v. F. N. Bank*, 84 N. Y. 420, 430.)

HAIGHT, J. This action was brought for a partition and an accounting for the rents of the premises known as No. 7 Great Jones street and No. 5 Barclay street in the city of New York.

On December 3, 1856, Nathan Starr died seized and possessed of these premises. He left a last will and testament the material portions of which are as follows:

"Fourth. I give and bequeath to my wife, Sarah Maria, the use and income of one-third part of my house and lot of land situate and lying in the city of New York and known as No. 7 Great Jones street; also one-third of the use and income of my store and lot of land in the city of New York and known as No. 5 Barclay street during her natural life.

"Sixth. I authorize and direct my said executors or such of them as shall take upon themselves the execution of this will, the survivor or survivors of them, to lease or rent that portion of my real estate not heretofore devised, being one-third of my house and lot of land known as No. 7 Great Jones street; also my store and lot of land known as No. 5 Barclay street, from time to time to collect the rents and income thereof, to pay

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all taxes, expenses and repairs and all other charges thereon, and to divide the residue of the income thereof and pay the same in equal proportions to my five children, Nathan S. Starr, Harriet W. Barry, Zaloman W. Starr, Mary E. Starr and Frederick A. Starr during their natural lives, and after their death I do devise and bequeath the same to their heirs in fee forever."

Thereafter an action was commenced in the Supreme Court by the widow Sarah Maria Starr against the children of the testator, in which judgment was asked that she have dower admeasured in the premises in addition to that devised to her, and that the provisions of the will be construed by the court and their true intent and meaning declared and adjudged.

Thereupon and on October 18, 1858, an agreement was entered into between the widow and the children of the testator in which such suit was settled and discontinued, she releasing her claim for dower and the children agreeing to keep the house and store in good repair, and to pay her one-third of the rents and income of the real estate, free from taxes, assessments or charges, ordinary and extraordinary. Thereupon the executors leased the whole of such premises and paid her one-third of the gross income therefrom until the commencement of this action.

This action is prosecuted by the plaintiff who is a grandson of the testator and a son of Nathan S. Starr, who was one of the executors appointed under the will to carry out its provisions. The trial court ordered a sale and a partition of the proceeds and out of such proceeds adjudged that the widow refund one-third of the taxes, repairs, insurance, etc., paid upon such premises during the six years prior to the commencement of the action.

The question presented is to be determined by the construction of the sixth clause of the will. The fourth clause gives the use and income of one-third of the real estate mentioned to the widow during her life, and this clause standing alone would doubtless require her to preserve the premises by paying her proportion of the taxes and repairs, and it is

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contended that the sixth clause does not change or limit her duty in this regard; that it creates a trust in the executors to rent the remaining two-thirds, to pay the taxes, expenses, repairs and other charges thereon, and to divide the residue among his five children, naming them, during their natural lives. This perhaps is the literal reading of the clause, but does such construction express the intent of the testator? No power of sale so far as the real estate is concerned, is given to the executors. A naked power in trust is created to rent the premises during the lives of the testator's children. The widow is given the use of one-third during her life; the children are given the use of the other two-thirds during their lives. The real estate is covered with buildings; that on Great Jones street is a dwelling-house, and that on Barclay street is a store. If as is claimed, the power in trust is limited to the two-thirds devised to the children for their lives, then it would follow that the executors could rent only two-thirds of the dwelling-house and two-thirds of the store, and the widow would have the right to either occupy or herself rent to others the remaining one-third of each of those buildings, and this right would extend to every room therein. For reasons that will readily suggest themselves, it will at once be seen that such a power would be impracticable, and impossible of execution, unless the widow should voluntarily join with the executors in leasing to the same persons. Although there is no express language extending the power of the executors to the life estate devised to the widow, yet it is quite apparent from the provisions of the will and the situation of the property that such was the intention of the testator.

In construing wills the court may transpose, reject or supply words so that it will express the intention of the testator. (*Phillips v. Davies*, 92 N. Y. 200-204; *Tilden v. Green*, 40 N. Y. S. R. 512-532; *Pond v. Bergh*, 10 Paige, 140.)

Extending the power given to the executors so as to include the life estate of the widow and inserting the proper words expressing such intent, they would be directed to rent the one-third of the premises the income of which was devised to the

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widow for life, as well as that portion devised to the children for their lives. With the powers of the executors so extended the sixth clause may be read as construed by the General Term, that is, that the executors are to collect the rents from the two-thirds devised to the children, and out of such rents to pay all the taxes, repairs, etc., thereon, meaning the trust estate, and to divide the residue of the two-thirds among the children.

This view would be in harmony with the concluding clause of the section in which the testator after the death of his children devises and bequeaths "the same" to the heirs of his children in fee forever, the words "the same" meaning the entire trust estate.

Of course, if the widow should at that time still be living, the devise would be subject to her life estate. The language used does not clearly express the intent of the testator and it is left somewhat obscure, but we are inclined to the view that his intentions were as above expressed, and that the will should be so construed.

This view was adopted by the parties to the contract to which we have alluded. It has been acted upon since October, 1858. It was adopted by the guardians of the grandchildren after the death of their parents and was acquiesced in by the plaintiff four years after he became of age. Whilst the grandchildren, as remaindermen, may not be bound by the contract entered into by their parents as life tenants, the construction adopted therein has been accepted and acted upon for so many years and is so eminently just that we should not feel justified in overturning the same, when the provisions of the will are reasonably capable of the construction given and so acted on.

The judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.

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EDWARD KANE, Respondent, v. THE NEW YORK, NEW HAVEN
AND HARTFORD RAILROAD COMPANY, Appellant.

A traveler approaching a railroad crossing guarded by gates, is not required to exercise the same vigilance in looking and listening as when the approaches are not so guarded.

In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, these facts appeared: plaintiff was driving along a highway, which crossed defendant's tracks, in an open wagon; the crossing was protected by gates on each side of the railroad; as plaintiff approached the tracks he found the gates closed; a train passed, the gates were opened and plaintiff started on but after he had passed the first gate, both were again closed so that escape was impossible; he was struck by another train and injured. It was dark at the time of the accident, and the train which had passed obstructed the view of the approaching train; plaintiff and his witnesses testified that they neither heard nor saw the latter until a moment before the collision. *Held*, that the question as to plaintiff's contributory negligence was properly submitted to the jury.

The court charged, on the question of damages, that plaintiff was entitled to recover for present pain and what he would endure in the future. *Held*, no error.

Plaintiff did not claim on the trial any liability on defendant's part because of a failure to ring the bell or blow the whistle on the approaching train, but the ground of liability was the alleged mismanagement of the gates. Before the trial the provision of the act of 1854 (§ 7, chap. 282, Laws of 1854), requiring the bell to be rung or whistle sounded upon a locomotive approaching a highway crossing had been repealed. (Chap. 593, Laws of 1886). Defendant's counsel requested the court to charge that it was not bound as matter of law to ring the bell or blow the whistle. This request was refused. *Held*, no error; as it had no bearing upon the issue.

(Argued January 27, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 16, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for personal injuries received by plaintiff through the alleged negligence of defendant.

The facts, so far as material, are stated in the opinion.

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Henry W. Taft for appellant. The verdict of the jury was contrary to the law upon the question of contributory negligence, and should have been set aside upon the motion for a new trial. (*Rogers v. Murray*, 3 Bosw. 357; *Wangler v. Swift*, 90 N. Y. 38; *Buckley v. G. P. & R. M. Co.*, 113 id. 540; *Clark v. Richards*, 3 E. D. Smith, 89; *Bunten v. O. M. Ins. Co.*, 4 Bosw. 254; *Currie v. Cowles*, 6 id. 460; *Eisey v. Metcalf*, 1 Den. 323; *Stanton v. Wetherwax*, 16 Barb. 259; *Emerson v. County of Santa Clara*, 40 Cal. 543; *Helbing v. S. Ins. Co.*, 54 id. 159; *Fleming v. M. Ins. Co.*, 4 Whart. 65; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 375, 379; *Glushing v. Sharp*, 96 id. 677; *Palmer v. N. Y. C. & H. R. R. R. Co.*, 112 id. 234.) The judge was in error in allowing the jury to base a finding of damages upon any pain which the plaintiff might suffer in the future, for the reason that there was no evidence that he would probably or even possibly suffer any such pain. (*Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534; *Mosher v. Russell*, 44 Hun, 12; *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305; *Filer v. N. Y. C. & H. R. R. R. Co.*, 49 id. 45; *Feeney v. L. I. R. R. Co.*, 116 id. 375; *Matteson v. N. Y. C. R. R. Co.*, 62 Barb. 364; *Laws of 1886*, chap. 593.) Non-experts may always testify from observation of facts to their opinion as to insanity, drunkenness, memory. (Whart. on Ev. §§ 451, 510, 512; Abb. Tr. Ev. 117, 118; *De Witt v. Barly*, 17 N. Y. 340; *Delafield v. Parish*, 25 id. 38; *Clapp v. Fullerton*, 34 id. 190; *Holcomb v. Holcomb*, 95 id. 320.) The cross-examination of a witness cannot be extended to new matter without being treated as the direct evidence of the party cross-examining and subject to the rules of direct-examination. (*Neil v. Thorn*, 88 N. Y. 270, 275; *Creevy v. Carr*, 7 C. & P. 64; *Rush v. Smith*, 1 C., M. & R. 93; *Ellmaker v. Buckley*, 16 S. & R. 72, 77; *Wood v. Connell*, 2 Whart. 542, 562; *Austin v. State*, 14 Ark. 555, 563; *Commonwealth v. Morrell*, 99 Mass. 542; *Clifford v. Hunter*, 3 C. & P. 16; *Wood v. Mackinson*, 2 W. & R. 273; *Bracegirdle v. Bailey*, 1 F. & F. 536; *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y.

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305; *McClain v. B. C. R. R. Co.*, 6 N. Y. S. R. 49; *Atkins v. M. R. Co.*, 32 id. 214; *Johnson v. M. R. Co.*, 52 Hun, 111; *Tozer v. N. Y. C. & H. R. R. Co.*, 105 N. Y. 617; *Turner v. City of Newburg*, 109 id. 617; *Griswold v. N. Y. C. & H. R. R. Co.*, 115 id. 64.)

John H. Clapp for respondent. Possibly it was not the duty of the defendant to put gates at the crossing, but having put them there the defendant was bound to keep them down, crossing the street, while any train was passing, or when any train was about to pass; to leave them up or to raise them was an invitation to any one desiring to cross the tracks to proceed. (*Oldenburg v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 414; *Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 id. 526; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 id. 234; *Lindeman v. N. Y. C. & H. R. R. Co.*, 42 Hun, 306; *Callaghan v. D., L. & W. R. R. Co.*, 52 id. 277; *Glushing v. Sharp*, 96 N. Y. 676.)

FOLLETT, Ch. J. The defendant's railroad runs through the village of Portchester in a northerly and southerly direction, crossing Adee street nearly at right angles and at grade. The passenger station is on the west side of the railroad and south of, and a little distance from, said street. The crossing is protected on both sides of the railroad by gates, which are lowered when trains are passing and raised when the defendant's gate-man deems it safe for teams and footmen to cross the tracks.

On the northerly side of Adee street, and on the easterly side of the railroad, there is a mound of rocks fifteen or twenty feet high, but its size is not otherwise described, nor does it appear how near to the street or railroad these rocks are.

For some time before the accident about to be described, the plaintiff had been employed as coachman and man of all work by Mr. Berrian, who resided some little distance from the station. At about 6.20 P. M. on the 6th of February, 1889, the plaintiff, while on his way to the station driving in an open buckboard wagon, reached a point about forty feet east of the

east gate, which he found closed; he waited until the east-bound train from New York to New Haven passed the crossing, at which time the gates were raised by the gateman and the plaintiff started to cross the tracks for the purpose of going to the station. Before he effected a crossing, the gates on both sides of the railroad were lowered so that escape was impossible, and while in this situation he was struck by a west-bound train running from New Haven to New York, and was quite severely injured.

The fact that the gates were raised and lowered as described, was not disputed on the trial, but the defendant insisted that the gates were raised after the first train passed by some person not in its service, but this issue was found for the plaintiff, and established the negligence of the defendant.

The defendant insisted on the trial, and now insists, that the evidence conclusively shows that the plaintiff, had he looked and listened, might have discovered the approaching train, and that by not doing so, he negligently contributed to his injury. It was dark at the time of the accident and the gas lights were burning.

The first train which passed just before the gates were raised was running on the easterly track, and the train from New Haven, which struck the plaintiff, was on the westerly track, so that during the time they were passing each other the train bound easterly obstructed the plaintiff's view of the train which inflicted the injury.

The engineer of the train testified that the locomotive bell was rung as it approached the crossing. The plaintiff and other witnesses testified that they neither heard nor saw the train until a moment before the collision.

Upon this issue the court, at the request of the defendant, charged that, (1) "Before attempting to cross the track the plaintiff was bound to look and listen, and if by looking and listening he might have seen and heard the train in time to avoid being struck, he cannot recover." (2) "That if the east-bound train obstructed his view, but it was moving out of his way, so that in a short space of time he would have had a clear

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view of the west-bound train approaching, and he, without waiting, and as soon as the gate was open, drove across and in consequence was injured, he was guilty of contributory negligence and cannot recover."

The defendant now insists that the jury, in returning a verdict for the plaintiff, violated the plain instructions of the court. It is possible that if the plaintiff had not been misled by the action of defendant's gateman, which was an invitation to the plaintiff to make the crossing, that he might, by the exercise of great vigilance and care, have discovered the approaching train in time to have avoided the collision; but it does not conclusively appear that had he looked when he started to cross the tracks that he could have seen the approaching train in time to have avoided the accident, as it was dark and his view was obstructed by the east-bound train and the mound of rocks. It is well settled that a traveler approaching a crossing guarded by gates is not required to exercise the same vigilance to look and listen as when he approaches one not so guarded. (*Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526; *Oldenburg v. N. Y. C. & H. R. R. Co.*, 124 id. 414; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 id. 234.)

Under the evidence in this case, it was a fair question of fact for the jury to determine whether the plaintiff by his own negligence contributed to the accident which caused the injury, and we do not think the defendant is in a position to take advantage of instructions which were perhaps too favorable to it.

The court charged that the plaintiff was entitled to recover, "for the pain which he has endured both present and future, because he cannot maintain any other action hereafter," to which instruction the defendant's counsel took the following exception: "I desire to except to your honor's charge where you say that the plaintiff is entitled to recover for the pain and suffering both present and future and I ask your honor to charge that any pain or suffering which he has now or has had in the past by reason of lack of proper medical treatment or care he cannot have pay for." The court replied: "I charge

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the jury that he has to recover for the injuries that he has sustained and that the jury can look to the future as well as to the past, because the plaintiff can maintain no other action." To this instruction the defendant's counsel took a general exception.

It is argued on the part of the appellant that these instructions were erroneous, for the reason that there is no evidence that the plaintiff would probably suffer pain in future. Upon this issue the plaintiff testified: "I was able to do anything before the accident. I could do anything before this happened me. Since this accident I cannot do near the work. My head sometimes when I am cleaning off the horses my head gets dizzy and have to catch hold the stall to keep myself up, and I forget a good deal. My memory is defective. It was good before, and my hip troubles me most of the time in damp weather. It is sore, it has the effect upon my power to walk, my ability to walk, that I cannot walk as good as I used to." The plaintiff's employer testified: "Since the accident plaintiff is very forgetful. Very recently and quite often I will arrive at the depot and he will take me home and I find when I reach home that he was told to tell me to procure something in the village and forgotten all about it. He never was that way prior to the accident. He is unable to do the work that he did before. He cannot do as much by one-half." A son of his employer testified: "Plaintiff was a very good workman, could do anything. Since this accident has occurred I have seen him around the place there. He is not a good workman now, at times he goes lame and is very forgetful and has no memory whatever. Prior to this accident he was not forgetful, he had a very good memory." The defendant called a surgeon who testified that he had examined the plaintiff and found a scar on the back of his head over an inch in length, that his nose was not straight, and gave evidence of pain on manipulation of his right hip joint which seemed neuralgic in character, that on manipulating the hip joint the plaintiff complained of pain and had a slight contraction of the muscles. That the trouble was in the muscles

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and it might be from a contusion. This evidence was sufficient to justify the court in charging the jury that the plaintiff was entitled to recover, if the defendant was liable, for the pain that he would endure in the future. No error was committed by the court in submitting the question of damages to the jury. The learned counsel for the defendant requested the court to charge "that the defendant was not bound, as a matter of law either to ring its bell or blow its whistle," which was refused and the defendant's counsel excepted. Section 7 of chapter 282, Laws 1854, which provides that a bell shall be rung or a whistle sounded on locomotives for at least eighty rods before crossing a highway or street, and makes railroad corporations liable for all damages sustained by any person by reason of neglecting this duty was repealed by chapter 593, Laws 1886. (*Lewis v. N. Y., L. E. & W. R. R. Co.*, 123 N. Y. 496.)

The plaintiff in this case did not claim that the defendant was liable because of its failure to ring a bell or sound a whistle but the sole ground of liability alleged in the complaint and proved on the trial was the mismanagement of the gates. Before this request was made the court had made no allusion to the sounding of the bell or whistle, and it was but incidently alluded to on the trial, not as a ground of liability, but as bearing upon the question of whether the plaintiff contributed to his own injury.

Whether the bell was rung not having been made an issue on the trial and the defendant's liability for the injury not being predicated upon the failure to ring a bell or sound a whistle it was not error for the court to refuse to charge as requested.

None of the objections to the admissibility of evidence require attention.

The judgment should be affirmed with costs.

All concur, LANDON, J., in result.

Judgment affirmed.

Statement of case.

SANFORD VROMAN et al., Appellants, v. CHARLES E. ROGERS,
Respondent.

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142 587

It seems, that a party having and assuming to maintain a dock and slip to supply wharfage for hire is bound to keep them in suitable condition for that purpose, and for any injury or loss resulting to a person properly using them, solely occasioned by a failure to perform this duty, he is liable.

The duty, however, is imposed upon one hiring wharfage to exercise ordinary care and, if by such exercise, he could have discovered the defect causing the injury, he is guilty of contributory negligence.

In an action to recover damages for an injury to plaintiffs' barge and its cargo while lying at defendant's dock, wharfage at which had been leased by plaintiffs, the testimony of the latter was to the effect that they made the lease upon the representation of defendant that the place at the wharf so let was safe and had six feet of water at low tide; that at the wharf it was less than six feet and the ground under the barge sloped down outward from the docks, so that at low tide the side of the barge near the dock rested on the bottom, and by reason of the slope broke away from its fastenings and turned over, thus causing the loss complained of. The barge had been at the dock for ten days prior to the injury, and at low tide had rested on the bottom. The court instructed the jury that if they found that the bottom of the slip was defective or in unsafe condition, and this caused the loss, the further question was for them to determine whether defendant was guilty of negligence and plaintiffs free from contributory negligence. Plaintiffs' counsel requested the court to charge "that if defendant made the statement that this place was all right, the plaintiffs had the right to rely on that statement." The court stated that the jury might consider that on the question of negligence, and declined to charge that the jury might rely on the statement or that it relieved them from making a personal examination. *Held*, no error; that while assuming the statement was made, plaintiffs were justified in assuming it to be true, and negligence could not be imputed to them in placing the barge there without personal examination, the inference was justified that when previously at low tide the barge rested on the bottom, it could have been easily ascertained whether the ground beneath it was suitable to rest upon, and the question of contributory negligence was properly submitted to the jury.

(Argued February 12, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made May 27,

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1889, which affirmed a judgment in favor of defendant entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Benjamin Rausch for appellants. Plaintiffs had a right to rely upon the representations made, and to assume that the defendant knew of the formation of the bottom of the slip. They were not required to make a personal examination, but were entitled to a reasonably safe place. (*Leary v. Woodruff*, 4 Hun, 99; 76 N. Y. 617; *Barber v. Abendroth*, 102 id. 406.) Defendant was bound to furnish them a reasonably safe place, even in the absence of any express agreement. (*Newall v. Bartlett*, 114 N. Y. 399; S. & R. on Neg. § 498; *Pittsburgh v. Guir*, 22 Penn. St. 54.)

H. B. Hubbard for respondent. The objection to the question put to the witness Hibberd Young was not well taken. (*Crosby v. Day*, 81 N. Y. 242; *Cushman v. U. S. L. Ins. Co.*, 70 id. 81; 1 Greenl. on Ev. [13th ed.] 490, § 440; *Price v. Powell*, 3 N. Y. 322; *Pullman v. Corning*, 9 id. 93; *Bearss v. Copley*, 10 id. 93; *Curtis v. Gano*, 26 id. 426; *Moore v. Westervelt*, 27 id. 234.) There can be no recovery unless there was a defect in the bottom of the river which caused the accident, and the jury believes that the defendant had notice that the bottom of the river at the point in question was unsafe, or could have discovered it by a reasonable examination commensurate with the use to be made of the premises, and was guilty of negligence in allowing the plaintiff to moor his vessel at the unsafe place; and unless the plaintiff is wholly free from any negligence on his part which contributed to the accident. (*Barber v. Abendroth*, 102 N. Y. 406; *Carlton v. F. S. Co.*, 99 Mass. 216; *Leary v. Woodruff*, 4 Hun, 99; 76 N. Y. 617.)

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BRADLEY, J. The purpose of the action was to recover damages for alleged injury to the plaintiffs' barge and its cargo while at the wharf of the defendant at the foot of Twenty-fourth street in the city of Brooklyn; and it was founded on the charge that the plaintiffs leased wharfage there of the defendant upon the representation of the latter that the place so let was safe, and that it had six feet of water at low tide; that the plaintiffs anchored their barge there loaded with hay and feed and tied it up to the dock; and that after it had remained there ten days, it broke away and turned over, causing the injury to the boat and the destruction of the cargo. And it is alleged that this was occasioned by the depth of the water at low tide, there being less than as represented, and by the unsafe condition of the ground beneath it. The barge was one hundred and sixty feet in length and thirty feet in width. And there was evidence tending to prove that the surface of the ground under the vessel sloped down outward from the dock so that at twelve or fifteen feet from it, the water was in depth six feet greater than it was four feet from the dock. It is claimed that the low tide at the time in question caused the side of the boat near the dock to rest upon the bottom, and by reason of the slope of the ground as before mentioned the boat broke away from its fastenings and turned over, producing the injury and loss complained of. And there was evidence tending to prove that such may have been the cause, although that was a question of fact for the jury and was submitted to them. The court having instructed the jury that if they found that the bottom of the slip was defective or in unsafe condition, and that it was the cause of the plaintiff's loss, the further questions for them to determine were whether the defendant was chargeable with negligence and the plaintiffs free from contributory negligence, as upon the finding of the former in the affirmative and the latter in the negative, the plaintiffs' right to recover was dependent. The plaintiffs' counsel requested the court to charge the jury that "if the defendant made the statement that

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this place was all right, the plaintiffs had the right to rely on that statement." The court thereupon remarked that the jury might consider that on the question of negligence and give it such weight as they thought proper, and declined to charge that the plaintiffs had the right to rely on the statement that the place was all right or that it relieved them from the necessity of making personal examination. And upon the exception to such refusal arises the main question requiring consideration. There was some evidence tending to support the fact that such statement was made to the plaintiffs before they took the wharf. And it is urged by the plaintiffs that the liability of the defendant was not dependent upon negligence, but that upon the finding of that fact by the jury the right to recover would necessarily follow as for breach of contract, if the slip was not all right and the injury was in consequence of such condition. There was in terms no undertaking to indemnify or protect the plaintiffs against loss by reason of any condition at the wharf or in the bed beneath the water there. The defendant was not asked to do that. What was said by him on the subject was in its nature a representation, and if made in good faith he could be charged with liability as for negligence only. The plaintiffs having and assuming to maintain the dock and slip to supply wharfage of vessels for hire, was bound to keep them in suitable condition for the purpose, and for any injury or loss resulting to persons properly using them occasioned by his failure to perform his duty in that respect, he was chargeable with negligence and liability. (*Leary v. Woodruff*, 4 Hun, 99; 76 N. Y. 617; *Barber v. Abendroth*, 102 id. 406; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216.) This duty of a wharfinger requires of him diligence to give safety to the use of the wharf and its harbor by his patrons, while upon them is imposed ordinary care. And assuming that assurance was given by the defendant to the plaintiffs that the place where the barge was moored was in suitable condition and all right, they were at liberty to assume it to be so, and were justified, without

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imputation of negligence on their part, to put their vessel there without personal examination, beyond what was obvious to ascertain whether or not it was suitable for their use, provided they correctly represented to the defendant the character of their vessel and the depth of water requisite for it. And if they suffered loss by reason of a defective condition of the wharf or slip before they had opportunity, or reason to observe or apprehend it, and which condition the defendant knew existed, or by proper diligence may have ascertained, he was chargeable with the consequences. But the plaintiffs' barge remained there ten days before the injury, and in the meantime it had at low tide rested on the ground of which the plaintiffs were advised. The inference was justified that it could then be easily ascertained whether, at its particular location, as tied to the dock, the ground beneath it was, or not, suitable for it to rest upon. And it was in reference to the knowledge and the means of observation during the time the boat was at the dock that the ruling was made upon the request to charge and the question of contributory negligence submitted to the jury. In that view it is not seen that the court was in error. The dock was over one thousand feet in length, and along it, farther down than the place where the barge was located, the water was deeper. And as bearing upon the question presented at the trial there was evidence on the part of the plaintiffs that their employe, who took the vessel to the dock, informed the defendant's superintendent before it was anchored there, that it drew six feet of water. There was also evidence tending to prove that the water near the dock at that place was, at low tide, of that and greater depth. And the inference was permitted that the designation of that place as suitable for the vessel was made by such superintendent in view of the information so received of the depth of water requisite to float it, and that if no more than as so represented had been required, the place may have been suitable for the wharfage sought by the plaintiffs, and the injury may not have been suffered. Thus was also presented by the evidence a

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question of fact not observed in the proposition which the court was requested to charge, and which so qualified the plaintiffs' right to have such proposition submitted to the jury as to support the refusal to charge it as matter of law.

There was no error in the ruling, and no exception was well taken.

The judgment should be affirmed.

All concur.

Judgment affirmed. _____

MARTIN V. B. SMITH et al., Respondents, v. CHARLES WISE et al., Impleaded, etc., Appellants.

In an action to set aside a general assignment as fraudulent and for an accounting, actual fraud as against creditors of the assignor, both on his part and that of the assignee, was proved and found. The interlocutory judgment adjudged the assignment void, appointed a receiver and required defendant to deliver to him all of the assigned property, and to pay over all the income, profits, etc., received therefrom "less any lawful disbursements made or incurred by said assignee." The assignor had been engaged in a manufacturing business. On the accounting the referee allowed the assignee the amount paid by him to the workmen in the factory, who were preferred, for work done prior to the assignment, and the additional value given to the stock by working it after the assignment, but refused to allow expenditures incurred by the assignee for appraising stock, payment for legal services, rent of factory, labor, etc. *Held*, no error; that the provision in the judgment did not extend the right to credits for disbursements beyond those which would be treated as lawful without its aid; and that as the disbursements so made were in furtherance of the fraudulent scheme, and by virtue of power dependent upon title or right of possession, they were unlawful.

The assignment preferred certain notes made by the assignor and indorsed by a firm, of which the assignee was a member; these notes were paid by the assignee before the commencement of the action. *Held*, that while the assignee was to be treated as never having had title, and, therefore, as against creditors, no rights dependent upon title were available to him, as the payment of the notes was made by direction of the assignor when he was at liberty to make it, and when the direction was operative, the assignee was entitled to be allowed the sum paid.

(Argued December 14, 1892; decided March 15, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made at the June term, 1889, which modified, and affirmed as modified, a final judgment in favor of plaintiffs and affirmed an interlocutory judgment entered upon an order of Special Term, confirming the report of a referee.

The action was brought to set aside the assignment of the defendant James White for the benefit of his creditors, to the defendant Charles Wise, as fraudulent against such creditors.

The assignor was engaged in the business of manufacturing shoes in the city of Brooklyn. He made the assignment April 22, 1886. The plaintiffs, then being creditors, afterwards in May, June and July following, recovered judgments against him, and on July fourteenth commenced this action.

The defendant White did not answer. The trial of the issues made by the answers of the other defendants resulted in a decision of the court that the assignment was fraudulent and void as against the creditors of White, followed by a judgment vacating the assignment, appointing a receiver to take possession of the property, and a referee to take and state the accounts of the defendants. The defendants Wise constituted the firm of L. & C. Wise, a creditor of White for considerable amount, and by the assignment given a preference preceded after that for wages of employees only by a debt represented by notes of White, indorsed by L. & C. Wise, held by the Irving National Bank. The trial court found that the assignment was made pursuant to arrangement between the parties to it, that the assignor and his wife should have and derive from it certain benefits and advantages in fraud of his creditors; and that shortly after the assignment was made, and to carry out such an arrangement, the assignee sold the stock and property in the shoe factory to the defendant Hirsch; that such sale was colorable only, and the defendants Wise furnished the money to make it; and that the business was carried on for their benefit in the name of Hirsch. By the judgment the sale to him was also set aside. And the referee, in stating the accounts of the defendants, charged them with

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the property, and gave them credit for only the amount of \$760.59, paid by the assignee to the workmen in the factory for services performed prior to the assignment. Exceptions taken to the disallowance to the assignee of certain items of credit claimed by him were heard at Special Term; and exception to the disallowance of the amount paid by the assignee to the Irving National Bank in satisfaction of the notes held by it and before mentioned was sustained, and the other exceptions save one were overruled. On appeal by both the plaintiffs and defendants to the General Term, the order of the Special Term, so far as it sustained such exceptions, was reversed and in other respects affirmed. The payments disallowed and for which the assignee claims he should have credit are:

1. The payment to appraisers for appraising the stock, machinery, etc., in factory, of	\$150 00
2. The payment to counsel for legal services rendered to the assignee.....	1,500 00
3. The payment for feed for horses, rent of factory, labor, etc.....	451 25
4. The payment to Irving National Bank of debt preferred in the assignment.....	4,871 94

Further facts, to which reference may be deemed necessary, appear in the opinion.

Otto Horwitz for appellants. The findings of fraud as against both the assignor and the assignee, made by the trial justice, are unsupported by evidence. (*Halpin v. P. Ins. Co.*, 118 N. Y. 165; *Brayton v. Sherman*, 119 id. 623; *Durant v. Pierson*, 124 id. 444; *T. N. Bank v. Guenther*, 123 id. 568; *Mandeville v. Avery*, Id. 376; *Smith v. Perrine*, 121 id. 376; *Nordlinger v. Anderson*, 123 id. 544; *Crook v. Rindskopf*, 105 id. 476; *Thompson v. Fuller*, 28 N. Y. S. R. 4; *Kingston v. Koch*, 57 Hun, 12; *Cuyler v. McCartney*, 40 N. Y. 241; *Talcott v. Hess*, 31 Hun, 282; *Shultz*

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v. *Hoagland*, 85 N. Y. 464; *Hardman v. Boehn*, 39 id. 200; *Livermore v. Northrop*, 44 id. 107; *Loos v. Wilkinson*, 110 id. 210; *Starin v. Kelly*, 88 id. 418; Penal Code, § 589; Perry on Trusts, 412-415, 422; *Halsted v. Gordon*, 34 Barb. 422; *Townsend v. Stearns*, 32 N. Y. 209-216; *Jessup v. Hulse*, 21 id. 168; *Levy's Acctg.*, 1 Abb. [N. C.] 177; *In re Rider*, 23 Hun, 91; *In re Hyman*, 13 N. Y. S. R. 136; *In re Wolff*, 13 Daly, 481; *In re Marklin*, Id. 105; *N. R. Bank v. Schuman*, 63 How. Pr. 476; *Boerum v. Schenck*, 41 N. Y. 182; *Fulton v. Whitney*, 66 id. 548; *Judson v. Abell*, 5 Wkly. Dig. 221.) There is no evidence in the case which will warrant any finding that the assignee was guilty of any meditated fraud in the assignment. (Burrill on Assign. § 371.) The lawful disbursements made or incurred by the assignee should have been allowed. (*Loos v. Wilkinson*, 113 N. Y. 485.) The assignee, before the commencement of this action and before the plaintiff had acquired any lien upon the moneys in his hands, paid to the Irving National Bank \$4,871.⁰⁴/₁₀₀, being the payment of promissory notes made by the assignor and held by the Irving National Bank, upon which notes the assignee's firm were indorsers, and which notes were preferred under the assignment. This payment should have been allowed to the assignee. (*Cramer v. Blood*, 57 Barb. 155; *Murphy v. Briggs*, 89 N. Y. 446; *Wakeman v. Grover*, 4 Paige, 23; *Ames v. Blunt*, 5 id. 13; *Knower v. C. N. Bank*, 124 N. Y. 552.)

Alex. Blumenstiel for respondents. Any device to cover up property for the benefit of the assignor, or to secure to him, directly or indirectly, any benefit is fraudulent. (*White v. Fagen*, 18 Wkly. Dig. 358; 3 R. S. [7th ed.] 2327, § 1; *McClurg v. Leckey*, 3 Penn. St. 83; *Currie v. Hart*, 2 Sand. Ch. 352; *Mackie v. Cairns*, 5 Cow. 547; Burrill on Assignments, 514; Bishop on Insolvency, 182, § 203.) An intentional omission from schedule of property belonging to the assignor is sufficient evidence of a fraudulent intent to vitiate

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the assignment. (*Bagley v. Bowe*, 18 J. & S. 100; *Schultz v. Hoagland*, 85 N. Y. 464; *Iselin v. Henlein*, 16 Abb. [N. C.] 73.) The conduct of the assignee, if not a part of the arrangement under which the assignment was made, would not invalidate it, but where the evidence shows that such acts are a part of a general plan of which the assignment was the inception, these are evidences of fraud, for which the assignment can be avoided. (*Cuyler v. McCartney*, 40 N. Y. 221, 239; *Pine v. Rickert*, 21 Barb. 469; *Shepard v. Hill*, 6 Lans. 387; *Forbes v. Waller*, 25 N. Y. 430.) Where a transfer is set aside for actual fraud actively and knowingly participated in by the grantee, the same is an absolute nullity from its inception, and the fraudulent grantee must account for the entire property received by him, and cannot be allowed for any payment made or obligation incurred by virtue of the fraudulent grant. (*Davis v. Leopold*, 87 N. Y. 620; *Burnham v. Brennan*, 10 J. & S. 49; *Swift v. Hart*, 35 Hun, 128; *Shaw v. Hanley*, 71 N. Y. 219; *Solomon v. Moral*, 53 How. Pr. 342; *Bump on Fraud. Conv.* 573, 574; *Loos v. Wilkinson*, 110 N. Y. 195; *Riggs v. Murray*, 2 Johns. Ch. 565; *Wood v. Hunt*, 38 Barb. 362; *Briggs v. Mitchell*, 60 id. 288; *Harris v. Sumner*, 2 Pick. 38; *McKie v. Gilchrist*, 3 Penn. 340; *Goodwin v. Hammond*, 13 Gal. 168; *Holland v. Crofut*, 20 Pick. 321; *Barland v. Walker*, 7 Ala. 269; *Pettibone v. Stevens*, 15 Conn. 26.) The judgment in this case has established that the instrument which has been set aside was never a general assignment. (*Billings v. Russell*, 101 N. Y. 226.) The defendants have, by their act, rendered the proceeding necessary, and they, and not the creditors, should pay the expense thereof. (*Bruce v. Kelly*, 7 J. & S. 27; *Pond v. Comstock*, 20 Hun, 492-497; *Dewey v. Moyer*, 72 N. Y. 76; *Wait on Fraud. Con.* § 192; *McCloskey v. Stewart*, 63 How. Pr. 142; *P. Bank v. Morton*, 67 N. Y. 203.)

BRADLEY, J. The case presented by the facts as found by the trial court was one of fraud in fact as against the creditors of the assignor and chargeable to both parties to the assign-

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ment; and such findings essential to the conclusion that the assignment was fraudulent and void as against such creditors were supported by the evidence.

And by it the inference was warranted, as the fact was found, that to consummate the plan and purpose, with which the assignment was made, to continue the business for the mutual benefit and advantage of the assignor and the defendants Wise, the sale of the stock, property and machinery of the factory was made by the assignee Wise to the defendant Hirsch, and that such sale was fictitious and made and intended as a cover to the business to be carried on with the property for the benefit of the other defendants pursuant to the design contemplated when the assignment was made, to the end that the assignor might realize a benefit to himself out of the assigned estate. The conclusion of the trial court was warranted by the evidence, and the interlocutory judgment entered on its decision was properly affirmed by the General Term.

Other questions arise on the appeal presenting for review the accounting represented by the referee's report. The evidence taken at the trial was not, nor was that taken before the referee, in the record upon that appeal to the General Term. The findings of the trial court as well as those of the referee were there. The facts represented by the record supported the view of the General Term that this case was one of actual, positive fraud as against the creditors of the assignor on the part of both him and the assignee. It followed that the assignment was, on its vacation, properly treated as void *ab initio*, and as a consequence it afforded no protection to the assignee to the prejudice of such creditors. (*Sands v. Codwise*, 4 Johns. 536; *Davis v. Leopold*, 87 N. Y. 620; *Swift v. Hart*, 35 Hun, 128.)

The referee allowed to him the amount paid the workmen in the factory for services performed prior to the assignment and the additional value given to the stock by working it after the assignment, so as to give the creditors the value only of it as of that time. The referee found that the various sums claimed to have been expended by the assignee, except that

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so allowed, were paid out in pursuance and furtherance of the scheme to defraud the creditors of White. And we think that none of them other than that paid to the Irving National Bank require any special consideration. It is urged that the assignee's right to allowance of his disbursements is preserved by the provisions of the decree entered upon the decision of the Special Term to the effect that the defendants should hand over to the receiver all the property of the assigned estate "and likewise account and pay over all the income, profits and benefits thereof received by them or either of them, *less any lawful disbursements made or incurred by said assignee.*" That provision has not been construed to extend the right to credits for disbursements beyond those which would be treated as lawful without its aid. We see no error in the disallowance of the assignee's claim for disbursements as such.

Before this action was commenced, the assignee paid to the Irving National Bank the debt due to it and which was firstly after wages of employes, preferred in the assignment amounting to \$4,871.94. There would have been no question about his right to credit for the amount so paid the bank if he had not been chargeable with actual fraud in the transaction of making the assignment, although it were set aside as fraudulent against the creditors of the assignor. (*Wakeman v. Grover*, 4 Paige, 23; *Ames v. Blunt*, 5 id. 13; *Collumb v. Read*, 24 N. Y. 505.) If this were a tortious intermeddling by Wise with the property of White, it would be seen that he could have no protection whatever in the disposition of it or its proceeds; and if such was the legal effect of the vacation of the assignment, the consequence would be the same. But that cannot be so. His possession was derived from the assignor and taken with his assent and was lawful. When the assignment was set aside for actual fraud of the parties to it, he was as to creditors treated as never having had title under the assignment, and, therefore, no rights dependent upon title were as against them available to him. The other disbursements referred to were made by virtue of power dependent upon title or the right to possession of the property which

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rested in the transferring clauses of the assignment. The payment to the bank was by the direction of the assignor expressed in that instrument. It was made when the debtor was at liberty to make it, and when the direction as such to the assignee was operative. The amount when so paid passed beyond his control, and the bank being a *bona fide* creditor, could retain it as against the other creditors. (*Knower v. Bank*, 124 N. Y. 552.)

While it is said an assignee chargeable with participation in the fraud cannot effectually assert any equity in his behalf, he may have rights which courts will recognize, arising out of his relation to the property taken by virtue of a fraudulent assignment so far as they are consistent with those of the creditors of the assignee, and do not prejudice them. (*Loos v. Wilkinson*, 113 N. Y. 485.) The rights of the creditors may be preferential, may be made so by voluntary payment, or may result from the greater vigilance of some than other creditors. In the present case, the bank had the benefit of the direction by the debtor of a preferential payment to it, and the execution of the direction. The assignee should be allowed the amount so paid, unless the fact that his firm had indorsed the notes held by the bank, denied to him the right to such allowance for the reason that otherwise a benefit would result to him from the appropriation of so much of the assigned estate. There may be some apparent force in that view in its bearing upon the policy of the law to permit the adoption of no rule which may tend to encourage fraud. But no benefit to the assignee was directly derived from the payment, although it had the effect to relieve him from a contingent liability. Nor was it an appropriation of the assigned property to the benefit of the assignee in the sense which furnishes a reason for charging him in behalf of other creditors as for misappropriation of the amount of the fund so paid to the bank, a creditor of the assignor. He had and executed the direction of the debtor White to pay the bank debt out of the property of which his possession was then lawful. (*Murphy v. Briggs*, 89 N. Y. 446, 451.) The view of the General Term in accord

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with that of the referee that the defendants should be charged with the expenses of the accounting, seems to dispose of that question. The construction of the provision of the interlocutory judgment to the effect that out of the proceeds and the property in the possession of the receiver, "after deducting the legal fees and expenses of the said receiver and of the said reference, the said receiver pay to the plaintiffs" the amounts of their judgments against Smith, is not necessarily that which is contended for by the defendants. While it apparently provides for taking the expenses of the reference out of the estate, its purpose may have been the protection of the receiver in paying them out of the fund and without any view to the relief of the defendants from such expenses. The case was not necessarily an improper one for charging them with the disbursements of the action; and this is done by a subsequent provision of the same judgment. There is no occasion to interfere on this review with the conclusion of the court below on the subject of those expenses.

The final judgment should be modified by deducting from the amount with which the defendants are there charged, the sum of \$4,871.94 paid by the assignee Charles Wise to the Irving National Bank, and interest from April 22, 1886; and in other respects the judgments should be affirmed.

All concur, FOLLETT, Ch. J., in result.

Judgment accordingly.

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SARAH M. WARNER, Respondent, v. THE PRESS PUBLISHING
COMPANY, Appellant.

While ordinarily in an action of libel, the question whether the publication complained of was privileged, is one of law for the court, where the facts upon which defendant bases the claim of privilege are disputed by plaintiff, it is for the jury to determine as to the existence of these facts. An imputation of malice arises from proof in an action of libel that the libelous publication is false, and when testimony is given on the part of defendant tending to prove the absence of actual malice, the question as to whether malice existed is one of fact, and if found to exist, the jury in their discretion may award exemplary damages.

A libel recklessly or carelessly published, as well as one induced by personal ill will, will support an award of exemplary damages.

In such an action, based upon an article in a newspaper published by defendant, accusing the plaintiff, a married woman, of unchastity, plaintiff's evidence showed the article to be false. Defendant gave evidence tending to prove the absence of actual malice on its part. The court was requested by defendant to charge that if the jury found it was not actuated by actual malice against plaintiff, they cannot award any damages for injured feelings or mental or bodily suffering; this was refused. *Held*, no error.

The libelous article suggested improper relations between plaintiff and one S. The husband of plaintiff was called as a witness by defendant, and asked if he had had any dispute or conversation with his wife in relation to S. This was objected to and excluded as incompetent under the provision of the Code of Criminal Procedure (§ 881), prohibiting a husband or wife from disclosing, without the consent of the other, a confidential communication made by one to the other. *Held*, no error.

(Argued January 29, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 3, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This was an action for libel.

The facts, so far as material, are stated in the opinion.

Joseph M. Keatinge for appellant. The jury were not properly instructed on the question of damages. The court erred in refusing to charge the jury that in the absence of actual malice on the part of the defendant they could not award

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damages for injured feelings, or mental or bodily suffering. (Townshend on Libel, § 201; *Fry v. Bennett*, 4 Duer, 257; *Brooks v. Harrison*, 91 N. Y. 91; *Bixby v. Dunlap*, 56 N. H. 456.) The court erred in excluding the evidence of the witness Warner to the effect that Smith, the writer of the letters which were in evidence in the case, had been the subject of conversation between Warner and the plaintiff. (Code Civ. Pro. § 831; *Fowler v. Fowler*, 19 Civ. Pro. Rep. 282; *Parkhurst v. Berdell*, 110 N. Y. 393.)

A. W. Gleason for respondent. Whether the report, if true, is privileged, is a question of law for the court, but whether the report was true and fair is a question of fact for the jury. (*Hamilton v. Eno*, 81 N. Y. 116; *Thomas v. Crosswell*, 7 Johns. 264; *Lovell Co. v. Houghton*, 116 N. Y. 525.) Charging substantially is sufficient. Court is not bound to adopt particular form presented. (*Allen v. Stock*, 51 N. Y. 668; *Conley v. Meeker*, 85 id. 618; *Holbrook v. U. & S. R. Co.*, 12 id. 236; *Abenheim v. Samuel*, 1 N. Y. Supp. 868.) The court is not bound to charge, upon request, how the jury shall find, if they find one way or the other as to particular facts. (*Rexter v. Starin*, 73 N. Y. 601; *Chapman v. E. R. Co.*, 55 id. 579; *Dolan v. D. & H. C. Co.*, 71 id. 285.) In an action for libel the jury may award exemplary damages for wounded feelings. (*Hamilton v. Eno*, 16 Hun, 599; 81 N. Y. 116; *Brooks v. Harrison*, 91 id. 83; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *King v. Root*, 4 Wend. 114; *Holmes v. Jones*, 121 N. Y. 461.) Special damages in the future cannot be proved and are disallowed. In actions *per se* the prohibition does not apply. (*Halstead v. Nelson*, 24 Hun, 400.) Malice does not mean ill will in libel suits; it is an implication of law from the false and injurious nature of the charge. (*King v. Root*, 4 Wend. 114; *Hamilton v. Eno*, 81 N. Y. 116; *Benjamin v. Jones*, 94 id. 51; *Moore v. M. N. Bank*, 123 id. 420; *Moore v. Francis*, 121 id. 199.) Plaintiff's requests were properly charged. (Code Civ. Pro. §§ 1907, 1908; Laws of 1871, chap. 219.) The context of

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charge must be properly considered as a whole. (*Culdwell v. N. J. S. Co.*, 47 N. Y. 282; *Rexter v. Starin*, 73 id. 601; *Moody v. Osgood*, 54 id. 488; *Morchouse v. Yeager*, 71 N. Y. 584; *Fitzgerald v. L. I. R. R. Co.*, 3 N. Y. Supp. 230; *De Wolf v. Williams*, 69 N. Y. 621; *Dunn v. Hornbeck*, 72 id. 80; *Koster v. Noonan*, 8 Daly, 231.) The damages awarded were not excessive. The exclusion of what Mr. Warner said to a reporter affecting his belief was not error. It was not a part of the judicial proceeding and was inadmissible. (*King v. Root*, 4 Wend. 114; Code Civ. Pro. § 831; *Parkhurst v. Berdell*, 110 N. Y. 386.)

PARKER, J. The judgment under review awards to the plaintiff damages against the defendant for publishing in the New York "World" what purported to be a brief report of a judicial proceeding which contained matter imputing unchastity to her.

The defenses sought to be interposed were :

1. That the publication was privileged because a fair and true report of a proceeding in court.
2. That it was true.

Ordinarily, whether a publication is privileged is a question of law for the court, but in this case the evidence presented by the plaintiff was to the effect that the matters in the publication of which complaint is made were neither introduced in evidence nor presented in court for such a purpose, and, therefore, formed no part of the hearing which the defendant pretended to report.

The defendant sought to show the contrary, and thus the case was brought within the rule that where the facts upon which the defendant bases a claim of privilege are challenged by the plaintiff, it then becomes the duty of the court to submit to the determination of the jury whether there exists the facts upon which the privilege was sought to be founded. (*Lovell Co. v. Houghton*, 116 N. Y. 525.)

This was properly done, and as one result of the verdict, it must be deemed established that the objectionable publication was not privileged.

An effort was also made on the part of the defendant to prove that the matter contained in the report was true.

This attempt was met by the testimony of the plaintiff asserting its falsity, and whether true or false, was one of the questions properly submitted to the jury, who by their verdict have settled that feature of the controversy favorably to the contention of the plaintiff.

But the appellant now insists that the court erred in refusing to charge the following request: "If the jury find that the defendant was not actuated by actual malice against the plaintiff, they cannot award any damages to her for injured feelings, or mental or bodily suffering."

It asserts that in the absence of actual malice, injury to feelings, or mental or bodily suffering are not elements of compensatory damages, but of exemplary damages; therefore, the request called for less than was the defendant's right.

This contention we regard as not well founded. From the standpoint at which we are required to view the case it appears that the defendant published of and concerning the plaintiff matters imputing unchastity to her; that it was not privileged and was false.

The plaintiff gave evidence of malice when she proved the falsity of the libelous publication, and in the absence of evidence on the part of the defendant tending to show that it had neither the desire nor the intention to wrong her, it would have been the duty of the court to instruct the jury that the plaintiff might be awarded exemplary damages in their discretion.

But testimony was adduced on the part of the defendant, tending to prove the absence of actual malice on its part towards the plaintiff, which taken in connection with the evidence of malice which the law imputed when the falsity of the libel was established, presented a question of fact whether malice existed in the publication. If found to exist, then, in their discretion, the jury could award exemplary damages. (*Samuels v. Evening Mail*, 75 N. Y. 604; 9 Hun, 288; *Bergmann v. Jones*, 94 N. Y. 51-61.)

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It is apparent, therefore, that the request was too broad, for had it been charged, it would have deprived plaintiff of her right to have that malice which the law imputed to the false publication, weighed by the jury, in connection with the testimony on the part of the defendant, to the effect that no ill will was entertained towards the plaintiff nor the publication prompted by malice, in determining whether there existed such malice as would justify exemplary damages.

A libel recklessly or carelessly published, as well as one induced by personal ill will, will support an award of punitive damages. (*Holmes v. Jones*, 121 N. Y. 461.)

Our attention is called to but one other exception. The libelous article suggests improper relations between the plaintiff and one Smith, evidenced by letters from Smith to her. She denied not only the charge, but all knowledge of the letters. The defendant asserted the truth of the charges and insinuations contained in the article, and in support of its contention called the husband of the plaintiff, to whom the following questions were propounded :

"Q. Had you any dispute with Mrs. Warner at any time about Smith? Q. Had you any conversation with Mrs. Warner, your wife, at any time in relation to a man by the name of Frank Smith or F. Sidney Smith?"

Objection was made that the evidence was incompetent, under section 831 of the Code of Civil Procedure, which provides that "a husband and wife shall not be compelled, or, without the consent of the other, if living, allowed to disclose a confidential communication made by one to the other during marriage."

The evidence offered could have no purpose useful to the defendant unless it tended to show that during such a conversation with her husband she said or did, or omitted to say or do something, from which it might be inferred that there existed an unlawful intimacy between her and Smith.

A conversation on such a subject between husband and wife seems to us to be clearly within the protection of the statute.

The appellant calls our attention to the decision in *Park-*

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hurst v. Berdell (110 N. Y. 386-393), in which Judge EARL, in speaking for the court, said: "What are confidential communications within the meaning of the section? Clearly not all communications made between husband and wife when alone. * * * They are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relations."

Clearly, the definition given does not exclude such a conversation as the defendant desired to prove from the protection of the statute. Its nature was not only confidential, but it was apparently induced by the marital relation, for it cannot be conceived that such a topic would have been the subject of discussion but for the existence of such relation between the parties.

A further test by which to determine whether a communication is confidential is suggested by the learned judge in characterizing the nature of the conversations sought to be excluded in that case. He said: "They were ordinary conversations relating to matters of business which there is no reason to suppose he would have been unwilling to hold in the presence of any person."

It cannot be supposed that both husband and wife would have been willing to discuss such a subject in the presence of other persons or would have consented to a repetition of the conversation by either party to it. Its nature, and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact.

The wisdom of the statute was never more apparent than in this case which exhibits a worthless husband in the attempted role of a destroyer of the good name of the mother of his children because she sought in the name of the law to compel him to contribute towards her support and that of his children.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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CYRUS D. ANGELL, Respondent, v. WILLIAM VAN SCHAICK et al., Appellants.

In an action by a real estate broker, living and doing business in Pennsylvania, to recover the compensation agreed upon for his services in effecting a sale for defendant, of certain lands in that state, the answer alleged in substance that under the statute laws of that state, all persons are forbidden from engaging in that business, without paying the prescribed fee and receiving a commission, and also are prohibited from recovering any compensation or commission for such services, which statutes were referred to and the material provisions set forth, that plaintiff when he rendered the alleged services had not paid the fee, that the highest appellate court in that state had "in a proper case brought before it for review," decided that a real estate broker not having paid the fee or obtained a commission could not recover compensation. Upon demurrer to the answer, *held*, that it set forth facts sufficient to constitute a defense; that it was not essential to set forth the facts appearing in the case referred to, or to give its title or where reported; but the averment that the courts of Pennsylvania had in "a proper case" made the decision was sufficient to allow proof that a decision had been made decisive of this case.

Also *held*, that the validity of the contract was to be determined by the laws of Pennsylvania.

Angell v. Van Schaick (56 Hun, 247), reversed.

(Argued February 3, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which reversed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. D. Northrup for appellants. The alleged contract and cause of action arose in the state of Pennsylvania, and related wholly to real estate situated therein. The questions at issue are, therefore, governed by the laws of Pennsylvania. (*Johnson v. Hulings*, 103 Penn. St. 498; *Holt v. Green*, 73 id. 198;

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Burkholder v. Beetem, 65 id. 496, 505; *Chadwick v. Collins*, 26 id. 138.) The alleged contract was an illegal contract, as well under the laws of New York as under the laws of Pennsylvania, for by the laws of Pennsylvania the plaintiff was prohibited from doing business as a real estate broker, without having a commission or license therefor, under a penalty of \$500 for each offense. (*Best v. Bauder*, 29 How. Pr. 492; *De Witt v. Brisbane*, 16 N. Y. 512; *Smith v. City of Albany*, 7 Lans. 14; *Swords v. Owen*, 43 How. Pr. 186; *Foley v. Spier*, 100 N. Y. 552; *M. Bank v. Spaulding*, 9 id. 62; *Thatcher v. Morris*, 11 id. 437.) The illegality need not be such as tends to a violation of law, for which a penalty may be inflicted, to make the contract invalid. (*Tracy v. Talmage*, 14 N. Y. 176, 179, 190; *Thalimer v. Brinkerhoff*, 20 Johns. 397, 398; *Jackson v. Walker*, 5 Hill, 27.) No claim can be founded upon an act, the effect of which is to evade an excise statute. (*Gray v. Hook*, 4 N. Y. 449; *Nellis v. Clark*, 4 Hill, 424; *Bell v. Leggett*, 7 N. Y. 176; *Mosley v. Mosley*, 15 id. 334; *Staples v. Gould*, 9 id. 520; *Porter v. Havens*, 34 Barb. 533; *Teal v. Walker*, 111 U. S. 242.) The jurisprudence of the several states of the Union is not viewed as foreign in any sense in the courts of the United States. (*Owings v. Hull*, 9 Pet. 625.) If the contract be rendered illegal, it can make no difference in point of law, whether the statute which has made it so has in view the protection of the revenue, or any other object. (*Cope v. Rowland*, 2 Crompt. 157.) The statute in question is both penal and prohibitory. If it were only penal, with no express words of prohibition, the affixing of a penalty for the doing of an act renders whatever the offender may do in contravention of the statute, illegal, and he cannot recover for anything that he may do, to which that penalty relates. (*Hazard v. Flury*, 120 N. Y. 227; *Brady v. Mayor, etc.*, 20 id. 312; *Irwin v. Williar*, 110 U. S. 499; *Shepard v. Powers*, 49 Barb. 419; *Oscanyan v. W. R. A. Co.*, 103 U. S. 261; *Brown v. Turkington*, 3 Wall. 377; *Prindle v. Caruthers*, 15 N. Y. 31.)

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William H. Henderson for respondent. The contract set out in the complaint, and which constitutes plaintiff's cause of action, tested by the laws of this state, is a valid contract; it is neither *malum in se*, nor unjust, nor inequitable. (Story on Conf. of Laws, §§ 29, 33.) The fact must affirmatively appear that the neglect to pay the tax and take the commission was with intent to evade the statutes set out in the defense demurred to in order to defeat an action upon the contract in the courts of the state of Pennsylvania. (*Baker v. Baker*, 6 Lans. 509.) Courts of this state, in considering questions of this character, will take no notice of the tax or revenue laws of other states. (*Randall v. Van Rensselaer*, 1 Johns. 94; *Andrews v. Herriot*, 4 Cow. 513; *Skinner v. Tinker*, 34 Barb. 333; *Thompson v. Ketchum*, 4 Johns. 288; *People ex rel. v. Gates*, 43 N. Y. 40.) The contract sued upon is just and equitable; the defendants have had the benefit of a full performance thereof on the part of the plaintiff. It would seem to be against public policy now to permit them to escape performance on their part. (Story on Conf. of Laws, §§ 22, 23.)

Per Curiam. It is alleged in the complaint that the defendants owned real estate in McKean county, Pennsylvania; that the plaintiff was a real estate broker, having his office in that county, and that in 1886 the defendants employed the plaintiff to sell their realty, agreeing to pay him \$500 for his services if he sold it for \$30,000. It is further alleged that the plaintiff effected a sale for the sum mentioned. An answer was interposed in which two defenses were pleaded: (1) A general denial; (2) that in 1885 and 1886, the plaintiff was a resident of, and engaged in the business of a real estate broker in, McKean county. It was further averred that by the statutes and laws of that state all persons are forbidden, under a penalty of five hundred dollars for each offense, to engage in that business without paying to the treasurer of the county a fee fixed by the statute, and obtaining from that officer a commission authorizing them to carry on the business. It was

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also alleged that "the highest court of ultimate and appellate jurisdiction of said state of Pennsylvania, in a proper case brought before it for review, has decided and still holds, that a real estate broker not having such commission or not having paid or caused to be paid into the treasury of the proper county, the sum of money required by said laws and statutes to procure the same, cannot recover compensation or commissions for his services as such real estate agent or broker. That by the laws and statutes of the state of Pennsylvania the plaintiff was absolutely prohibited from using or exercising the business or occupation of a real estate broker within the state of Pennsylvania under a penalty of five hundred dollars at and during all the times and periods of time mentioned in said complaint, and was also thereby prohibited from recovering in an action, any compensation or commissions for his alleged services as a real estate broker, alleged in said complaint." * * *

The statutes are referred to in the answer by the dates of their enactment, and the most important sections are literally set forth. It was further alleged in the answer: "That the plaintiff before the first day of January, 1887, had never paid or caused to be paid the sum or fee provided and required by said section five of said laws and statutes." "That the whole of the said alleged services of the plaintiff for the defendants herein, and all the other matters and transactions alleged in said complaint, so far as any thereof ever occurred, took place or were transacted, or performed, occurred, took place and were performed and transacted in said city of Bradford in said county of McKean and state of Pennsylvania, and none thereof were performed, transacted, nor agreed to be done, performed or transacted without said county of McKean; and that the land and property alleged and mentioned in said complaint was wholly situated in said county of McKean." To this defense the plaintiff demurred "upon the ground that such second defense is insufficient in law upon the face thereof, in not stating facts sufficient to constitute any defense." This demurrer was overruled at the Special Term, and a judgment

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entered which was reversed at the General Term, and leave was granted the defendants to appeal to this court.

The learned counsel for the plaintiff says in his points that the second defense is insufficient because: (1) "There is no averment that the facts appearing in the complaint and in the answer demurred to, do constitute such a *proper case*; (2) There is no averment that the highest appellate court of said state of Pennsylvania ever did decide or ever will decide as in the answer averred upon the facts now appearing in these pleadings; (3) What facts must appear to constitute a proper case in the judgment of that court of ultimate and appellate jurisdiction is left wholly unstated." The position of counsel is not very clearly stated. Of course no decision has been made by the courts of Pennsylvania upon the identical facts presented by the pleadings in this case, because they have never been before those courts, but if the learned counsel for the plaintiff means that the defendants should have averred in their answer that the decisions were made in cases involving facts like or similar to those in the case at bar, that mode of pleading would be open to his objection that such an averment would be but an allegation of the conclusion of the pleader that the facts involved in the decided cases were in legal effect the same as those set out in the answer in this case, and the result would be that all of the facts in the decided cases would have to be set forth in order to enable the defendants to prove the decisions of that state. We are not now concerned about what the courts of Pennsylvania have decided or upon what particular facts their decisions were made. The sole question before us is, have the defendants pleaded sufficient facts to enable them to prove what those courts have decided? Upon the trial those decisions will or may be proved in the manner provided by our laws, and then the courts of this state will be called on to determine whether the adjudications made by the courts of the state of Pennsylvania are decisive of this case. It is sufficient to aver that the courts of that state have held that a real estate broker cannot, under their statutes, recover compensation for his services in negotiating sales without hav-

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ing received a commission authorizing him to engage in that business. It is neither necessary to set out the facts on which the decisions were rendered, nor to refer to the cases by title, nor aver when or where reported, if reported.

The validity of this contract must be determined by the laws of the state of Pennsylvania, and we think that under the rule laid down in *Marie v. Garrison* (83 N. Y. 14) and *Lorillard v. Clyde* (86 id. 384), it is sufficient to aver that the courts of Pennsylvania hold that a real estate broker cannot recover his commissions unless authorized to engage in that business, as required by the statutes of that state.

The judgment of the General Term should be reversed, with costs, and the plaintiff should have leave, upon the payment of costs within twenty days, to withdraw the demurrer and try the issues raised by the pleadings.

All concur.

Judgment accordingly.

GEORGE W. McINTYRE, Respondent, v. LUTHER H. BUELL et al.,
Appellants.

To constitute a cause of action for fraudulent representations on the part of the vendor on sale of property, it is necessary to show not only a false statement or representation as to the property but that such representations were made with intent to deceive, and that the accomplishment of this intent was the result of the vendee's reliance upon the representations. Where in an action to recover the purchase-price as agreed to be paid under a contract for the sale of property, defendant sets up as a counter-claim a cause of action for fraud on the part of the vendor in the sale, as defendant does not proceed in disaffirmance of the contract, it remains effectual, subject only to such damages as defendant may have sustained from the fraud alleged; in such case, therefore, restoration by the defendant of anything received under the contract is not essential. Plaintiff, who owned what was termed "a locator's mining claim" in government lands, contracted to convey the same to a company to be formed to develop the "lode," defendants, as part of the consideration, agreeing to pay a sum named. The claim was conveyed as agreed. In an action to recover a portion unpaid of the purchase-money, defendants set up as a counter-claim that plaintiff, to induce them to enter into the agreement, falsely and fraudulently repre-

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sented that he was seized of the whole lode, when he had, in fact, previously conveyed his right to one-third of the surface ground of the lode to a niece, whereby they sustained damage. Plaintiff denied making any false representations, and testified that he informed defendants that he had given to his niece one-third of the surface. A deed to the niece was given in evidence. The court charged that it conveyed the right to the surface only, and did not impair plaintiff's right to the materials beneath. To this defendants excepted. The jury found for plaintiff on the issue of fraud. *Held*, that whether the deed conveyed one-third of the whole claim or a right only to one-third of the surface, if plaintiff represented that he owned the whole, the falsity of the representation was established; but that the jury having found with plaintiff on this issue, the construction of the deed was immaterial, so far as the counter-claim was concerned, and so, if erroneous, was not ground for reversal; that had the jury been instructed that the deed conveyed one-third of the mine instead of one-third of the surface only, this, conceding it to be correct, would not alone have warranted a finding of fraud, as while it would show a mistake on the part of plaintiff as to the construction, it would not establish any fraudulent intent.

It seems that if defendants had sought in their counter-claim simply an abatement from the purchase-price, growing out of the failure of plaintiff to perform his contract, or if a rescission had been sought on the ground of mutual mistake, the charge, if erroneous, would have been material.

(Argued February 3, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

On July 21, 1881, the parties to this action entered into the following agreement:

"For the purpose of forming a syndicate to purchase the 'John' and 'Forrest' lodes located in San Juan county, state of Colorado, and ultimately form a company to develop the same, we, George W. McIntyre and Luther H. Buell and Charles D. Safford, do hereby jointly and severally covenant and agree.

"George W. McIntyre agrees to put in the 'John' lode for \$8,000 to be paid for in cash \$4,000 and syndicate shares or stock \$4,000 on a basis of fifty shares at \$500 each making

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\$25,000 for the proposed purchases of the 'John' and 'Forrest' lodes (being $8\frac{1}{2}$ shares).

"Messrs. Buell and Safford also agree to pay for the 'Forrest' lode themselves, also all commissions and are to have the remaining shares of the above-named fifty as their portion of the transaction. George W. McIntyre is to leave a deed of the 'John' lode with Messrs. Buell and Safford to be used only when the above arrangement is consummated and only in case the original Cameron scheme should fail to carry out its contemplated plans, otherwise said deed is to be duly returned to said McIntyre."

Five days prior to the date of this agreement, McIntyre had conveyed the "John" lode to Safford as trustee.

Thereafter the Cameron scheme having failed, Safford conveyed the property to "The Cameron Gold and Silver Mining Company" of San Juan, Colorado, and plaintiff thereupon received the stock to which, under the foregoing agreement, he was entitled, and was paid \$1,900 in money. This action was brought to recover the balance of the sum of \$4,000 stipulated to be paid to him.

The defendants alleged as a defense and counter-claim, that the plaintiff with intent to influence defendants to enter into said agreement and to deceive and injure them, falsely and fraudulently represented that the said John lode was fifteen hundred feet long and three hundred feet in width and that he was seized of the whole thereof, and that relying upon such representations, defendants entered into said agreement and made the payments aforesaid, but that after so doing they ascertained that on October 9, 1879, plaintiff had conveyed to Hannah B. McIntyre the south one hundred feet of the surface ground of the said lode its entire length, and that by reason thereof they had sustained damage which they sought to counter-claim against plaintiff's demand.

Further facts are stated in the opinion.

John J. Linson for appellants. The learned judge at the Circuit erred in his construction of the deed from plaintiff to

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Hannah B. McIntyre, and in his instructions to the jury as to its effect upon defendants' rights. (U. S. R. S. chap. 6, § 32; *M. Co. v. Tarbet*, 98 U. S. 463; *M. D. M. Co. v. Callison*, 5 Sawy. 439; *Chapman v. Toy Long*, 4 id. 28; *I. S. M. Co. v. E. M. & S. Co.*, 118 N. Y. 196; *A. Co. v. T. Co.*, 122 U. S. 478; *I. S. M. Co. v. Cheesman*, 116 id. 529; *Davis v. Weibbold*, 139 id. 507; *Deffeback v. Hawke*, 115 id. 392.) The defense and counter-claim are based on fraud. Plaintiff never did and never could, at least since 1879, have furnished the mining property which he claimed to have; his title was comparatively worthless; the instructions to the jury were wholly misleading, and gross injustice has been done. (*Whitney v. Allaire*, 1 N. Y. 305; *Clark v. Baird*, 9 id. 183; *Wardell v. Fosdick*, 13 Johns. 325; *Morrell v. Colden*, Id. 396; *Paine v. Upton*, 87 N. Y. 327; *Hammond v. Pennock*, 61 id. 145; *C. F. Co. v. Moffatt*, 147 Mass. 403; *Alvarez v. Brannan*, 7 Cal. 503; *Bryant v. Boothe*, 30 Ala. 311; *Parham v. Randolph*, 4 How. [Miss.] 435; *Ingram v. Morgan*, 4 Hum. 66; *Ballou v. Lucas*, 59 Ia. 22; *Thompson v. Sanders*, 118 N. Y. 252; *Van Epp v. Harrison*, 5 Hill, 63; *Vail v. Reynolds*, 118 N. Y. 297; *Gould v. C. Bank*, 99 id. 333.)

Adelbert Moot for respondent. There is nothing here on which fraud may be predicated. (*S. D. Co. v. Silva*, 8 Sup. Ct. Rep. 881.) Where a party seeks to recover damages for fraud, he must rescind the contract and restore, or offer to restore, to the other party what he has obtained. (*Lindsley v. Ferguson*, 49 N. Y. 623; *Gould v. C. Bank*, 86 id. 75.) There is no fraud, because the deed to Hannah McIntyre on which the whole defense hinges, expressly states that it is only intended thereby to convey the surface ground. (Sedg. on Tit. §§ 105, 106, 115; *W. Co. v. Lebanon*, 4 Col. 114; *Eighmie v. Taylor*, 98 N. Y. 288.)

BROWN, J. The asserted counter-claim was a cause of action founded upon alleged fraud. In making this claim, the

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defendants did not proceed in disaffirmance of their contract with the plaintiff, and that agreement remains effectual, subject only to such damages as they may have sustained from the fraud which they charge upon the plaintiff. For the purposes of this action, therefore, no restoration of anything received under the agreement was essential. (*Gould v. Cayuga County Bank*, 99 N. Y. 333; *Thomson v. Sanders*, 118 id. 252; *Vail v. Reynolds*, Id. 297.)

It was a fact well known to the defendants that the plaintiff had no title to the "John" lode. What he had and claimed to have was a locator's mining claim, and whether that would receive recognition from the government, and a title to the land he conveyed by it to the holder, was a matter of which defendants were to take the risk.

The defendants' contention was that plaintiff represented that he possessed a claim to the whole lode, fifteen hundred feet long and three hundred feet wide, whereas he had conveyed his right to one-third of it to his niece, Hannah McIntyre. The plaintiff denied making any false representation to the defendants as to the size or extent of the claim, and testified that he repeatedly told them that he had given to his niece the right to the surface of the south one hundred feet thereof. He testified that he had no recollection of the deed, but he did not deny its execution.

We must assume from the verdict of the jury that they adopted plaintiff's version of the transaction.

The deed to Hannah McIntyre was produced on the trial and the court charged the jury that it conveyed the right to the surface of the land only and did not impair the plaintiff's right to his claim to the minerals beneath the surface, and the exception to the construction thus given to the deed is the only question necessary to be considered upon this appeal.

The construction and effect of the deed to Hannah McIntyre is not a question of importance to the cause of action constituting defendants' counter-claim. The representations there alleged to have been the inducement of the contract, would have been shown to have been false whether the deed con-

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veyed one-third of the whole claim or a right only to one-third of the surface. The latter construction was the one claimed by the plaintiff, and his testimony was to the effect that he had informed defendants that he had conveyed away such a right.

In considering the exception, therefore, it is evident that it has no effect upon the case made by the defendants' testimony. The jury have rejected their version of the transaction and adopted the plaintiff's, and the effect of the appellants' argument is to ask us to hold that, adopting the plaintiff's evidence as to the facts, the jury would have been warranted in finding fraud had they been instructed that the deed conveyed one-third of the mine instead of one-third only of the surface.

Had the defendants sought in their counter-claim an abatement from the purchase-price growing out of the failure of the plaintiff to perform his contract, or if a rescission was sought on the ground of mutual mistake, the erroneous ruling of the court would have a most material bearing on this appeal. But the counter-claim constituted a cause of action for fraud and deceit, and it was incumbent upon the defendants to prove not only a false statement or representation as to the property agreed to be conveyed, but that such representations were made with intent to deceive and that such was the result of defendants' reliance upon them. And we must find the evidence of such fraudulent intent in the record before us. The defendants have had their day in court and were bound to prove their whole case, and if it is claimed that there was an erroneous ruling upon the construction of the deed, it must appear that, upon the evidence before us, the jury would have been justified in finding a different verdict than that rendered had the court instructed them upon the legal effect of the deed, in accordance with defendants' request.

As I have already stated, the construction of the deed had no bearing upon the truth or falsity of defendants' evidence, and the question now presented is, would it have permitted the jury, upon plaintiff's own testimony, to have found a fraudulent intent?

Very obviously it would not. Treating it as we must in the light of the fact now determined, that the only representation was that plaintiff had conveyed to his niece one-third of the surface of the ground only a ruling by the court that the deed conveyed one-third of the mine, would have shown that the plaintiff's statement was untrue. Beyond that it would have had no effect on the case. It would not have shown that it was fraudulent. That fact remained to be proven by independent evidence, and I find none in the case that would justify such a conclusion.

The deed is not free from ambiguity. The rulings of the trial court and the General Term show that the plaintiff's construction has support in the language of the instrument. Of course, if he so believed and honestly stated his belief, there would be no basis for a finding that he intended deceit.

There is no evidence in the case as to the claim made by the grantee under the deed. She did not appear to be in possession, nor was it shown that she had ever asserted any rights in the property antagonistic to or inconsistent with the plaintiff's representations. It did appear that the corporation to which the property was conveyed by defendants, failed to get a title from the government for the one-third described in the deed and we may assume that that was because of the existence of the deed, but it nowhere appears that it was because of any claim made by Hannah McIntyre.

For aught that appears in the evidence, Hannah McIntyre may have claimed no greater right in the property than the plaintiff said he had conveyed to her, and if such was the fact, there was, of course, no false representation and no deceit.

Innocence, therefore, is entirely consistent with the case made by the evidence, and under such circumstances, guilt cannot be found. Fraud must be proven and cannot be presumed, and we think that the evidence before us would not support any other conclusion than that plaintiff was entirely honest when he asserted that the rights that he had conveyed to his niece were in the surface of the ground only. We think it unnecessary to determine the proper construction of the

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deed, and that assuming for the purposes of this appeal that the trial court's construction was not the correct one, the error was not one which permits a reversal of the judgment.

The judgment should be affirmed.

All concur, except PARKER, J., not voting.

Judgment affirmed.

IRA DWIGHT, Respondent, v. THE ELMIRA, CORTLAND AND
NORTHERN RAILROAD COMPANY, Appellant.

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148	116
132	199
d164	420
e164	421

In actions to recover damages for injuries to real estate caused by the unlawful separation and removal of something therefrom, the courts recognize two elements of damage. 1. The value of the thing taken, after separation from the freehold, if it have any. 2. The damage to the realty, if any, occasioned by the removal.

Where plaintiff asserts his right to go beyond the value of the thing taken or destroyed, after severance from the freehold, so as to secure compensation for the damage done to his land, the measure of damages is the difference in value of the land before and after the injury.

In an action to recover damages for alleged negligence, resulting in setting on fire and destroying certain bearing fruit trees upon plaintiff's premises, plaintiff's witnesses were asked what the trees were worth at the time they were killed, and were permitted to answer under objection and exception. *Held*, error; that the evidence tended to show, not the value of the trees severed from the soil, but their value as bearing fruit trees connected with and dependent upon the soil; that this was not a proper measure of damages.

Whitbeck v. N. Y. C. R. R. Co. (36 Barb. 644), distinguished.

The distinction pointed out between this case and where forest trees fully grown or nursery trees are unlawfully severed from the soil and carried away, or where coal or minerals are removed therefrom.

(Argued February 2, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 29, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages for alleged negligence.

The facts, so far as material, are stated in the opinion.

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James Armstrong for appellant. The referee adopted an erroneous rule as to the measure of damages. The rule as to the measure of damages when an injury is done to the inheritance is the difference in its value before and after the injury or trespass. (*Argotsinger v. Vines*, 82 N. Y. 308; *Van Deusen v. Young*, 29 id. 9; *Bevier v. D. & H. C. Co.*, 13 Hun, 254.)

Raymond L. Smith for respondent. The evidence of plaintiff as to value was proper and competent. (*Whitbeck v. N. Y. C. R. R. Co.*, 36 Barb. 644; *Argotsinger v. Vines*, 82 N. Y. 308-314.) The old rule of requiring a witness to state two values, one before and the other after, in case of an injury to real estate, in order to measure the damage, is not sound. Especially when as applied to trees and timber lands, for in modern times the value of timber is measured by the stumpage, which is equivalent to stating the value of the trees irrespective of the soil. (36 Barb. 644; 66 id. 88; 13 Hun, 260; 52 id. 353.)

PARKER, J. The judgment awards to the plaintiff five hundred and three dollars for damages occasioned by the defendant's negligence, in setting on fire and destroying twenty-one apple trees, two cherry trees, and two and one-half tons of standing grass, and also injuring seven apple trees, the property of plaintiff.

The only question presented on this appeal, is whether the proper measure of damages was adopted on the trial.

A witness called by the plaintiff was asked: Q. What were those twenty-one trees worth at the time they were killed? Objection was made that the evidence did not tend to prove the proper measure of damages, but the objection was overruled and the answer was: A. "I should say they were worth fifty dollars apiece." Similar questions were propounded as to the other trees; a like objection interposed; the same ruling made; answers to the same effect, except as to value, given; and appropriate exceptions taken.

Testimony was also given, tending to prove that the land

burned over by the fire was depreciated in value thirty dollars per acre.

The only evidence offered by the plaintiff touching the question of damages, was of the character already alluded to.

Fruit trees like those which are the subject of this controversy, have little if any value after being detached from the soil, as the wood cannot be made use of for any practical purpose, but while connected with the land they have a producing capacity which adds to the value of the realty.

Necessarily the testimony adduced tended to show not the value of the trees, severed from the freehold, but their value as bearing trees, connected with and depending on the soil for the nourishment essential to the growth of fruit.

How much was the realty, of which the trees formed a part, damaged, was the result aimed at by the questions, and attempted to be secured by the answers.

Can the owner of an injured freehold, because the trees taken or destroyed happen to be fruit instead of timber trees, have his damages measured in that manner, is the question presented now for the first time in this court so far as we have observed.

The learned referee followed the decision in *Whitbeck v. N. Y. C. R. R.* (36 Barb. 644), in which the proposition is asserted that while fruit trees form a part of the land, the true rule is that if the thing destroyed has a value which can be accurately measured without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction. The court cited no authority for the conclusion reached, and our attention has not been called to any prior decision justifying its position. Nor has the *Whitbeck* case been approved in this court, although cited and distinguished in *Argotsinger v. Vines* (82 N. Y. 309). While the rule is undoubtedly as stated by the learned judge in the *Whitbeck* case, that a recovery may be had for the value of the thing destroyed, where it has a value which may be accurately meas-

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ured without reference to the soil in which it stands, he apparently overlooked the fact that fruit trees do not have such a value and the rule was, therefore, as we think wrongly applied.

Cases are not wanting to illustrate a proper application of that rule. Where timber, forming part of a forest, is fully grown, the value of the trees taken or destroyed can be recovered.

In nearly all jurisdictions this is all that may be recovered, and the reason assigned for it is that the realty has not been damaged, because the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. (Sutherland on Damages, vol. 3, p. 374; Sedgwick on Damages [8th ed.], vol. 3, p. 45; *Single v. Schneider*, 30 Wis. 570; *Webster v. Moe*, 35 id. 75; *Webber v. Quaw*, 46 id. 118; *Haseltine v. Mosher*, 51 id. 443; *Tuttle v. Wilson*, 52 id. 643; *W. W. Co. v. U. S.*, 106 U. S. 432; *Graessle v. Carpenter*, 70 Iowa, 166; *Ward v. Carson R. W. Co.*, 13 Nev. 44; *Tilden v. Johnson*, 52 Vt. 628; *Adams v. Blodgett*, 47 N. H. 219; *Cushing v. Longfellow*, 26 Me. 306.)

In this state it is settled that even where full-grown timber is cut or destroyed, the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting, or destruction complained of. (*Argotsinger v. Vines*, 82 N. Y. 308; *Van Deusen v. Young*, 29 id. 36; *Easterbrook v. Erie R. Co.*, 51 Barb. 94.)

The rule is also applicable to nursery trees grown for market, because they have a value for transplanting; the soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages. (Sedgwick on Damages [8th ed.], vol. 3, p. 48; *Birket v. Williams*, 30 Ill. App. 451.)

Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages where it has a value after removal, and the land has sustained no injury because of it.

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(Sedgwick on Damages [8th ed.], vol. 3, p. 48; Sutherland on Damages, vol. 3, p. 374; American & English Ency. of Law, vol. 5, p. 36, note 2; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Oak Ridge Coal Co. v. Rogers*, 108 Pa. State, 147-152; *Dougherty v. Chesnut*, 86 Tenn. 1; *Coleman's Appeal*, 62 Penn. St. 252; *Ross v. Scott*, 15 Lea [Tenn.], 479-488; *Forsyth v. Wells*, 41 Pa. St. 291; *Chamberlain v. Collinson*, 45 Iowa, 429; *Morgan v. Powell*, 3 Adol. & Ellis [N. R.], 278; *Martin v. Porter*, 5 M. & W. 351.)

On the other hand, cases are not wanting where the value of the thing, detached from the soil, would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land.

This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. (*Longfellow v. Quimby*, 33 Me. 457; *Chipman v. Hibberd*, 6 Cal. 162; *Wallace v. Goodall*, 18 N. H. 439-456; *Hayes v. C. M. & S. P. R. Co.*, 45 Minn. 17-20.)

In *Wallace's* case (*supra*), the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees considered as timber may from their youth be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil."

The same rule prevails as to shade trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. (*Nixon v. Stillwell*, 52 Hun, 353, and cases cited *supra*.)

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The current of authority is to the effect that fruit trees and ornamental, or growing trees, are subject to the same rule. (*Montgomery v. Locke*, 72 Cal. 75; *Mitchell v. Billingsley*, 17 Ala. 391-393; *Wallace v. Goodall*, 18 N. H. 439-456; *Sedgwick on Damages* [8th ed.], vol. 3, § 933.)

It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage.

1. The value of the tree or other thing taken, after separation from the freehold, if it have any. 2. The damage to the realty, if any, occasioned by the removal. (*Ensley v. Mayor, etc.*, 2 Baxter [Tenn.], 144; *Striegel v. Moore*, 55 Iowa, 88; *Longfellow v. Quimby*, 33 Maine, 457; *Foote v. Merrill*, 54 N. H. 490.)

A party may be content to accept the market value of the thing taken, when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken, or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury.

In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value.

This was his right, but the measure of damages in such a case is, as we have observed the difference in value of the land, before and after the injury, and as this rule was not followed but rejected on the trial, and a method of proving damages adopted, not recognized nor permitted by the courts, the judgment should be reversed.

All concur, except BRADLEY, BROWN and LANDON, JJ., dissenting.

Judgment reversed.

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ISRAEL D. GOODMAN, Respondent, v. JACOB COHEN, Appellant.

In an action to recover the alleged purchase-price of certain goods, plaintiff's evidence was to the effect that his stock of goods, which was insured in four companies, having been damaged by fire, appraisers were appointed, one by plaintiff, and one, the defendant, by the companies; that in order to facilitate the adjustment, defendant agreed to and did purchase, for himself, a portion of the damaged goods, in respect to which the appraisers could not agree, at cost price, he agreeing to pay the purchase-price to the companies in proportion to the amount of their respective policies, the amount to be included in the award as if the goods sold were a total loss. In respect to one of the companies, the financial condition of which was doubtful, defendant agreed that if it became insolvent within sixty days, so as not to pay its policy, he would pay its proportion to plaintiff. *Held*, that the agreement was not one to answer for the debt or default of another, but an agreement to pay the purchase-price of goods sold to himself, either to the company or to plaintiff; the contingency not affecting defendant's liability, which was absolute, but only the method of discharging it; and so that the contract was not within the Statute of Frauds; also, that the contract was not void as against public policy.

(Argued February 4, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made March 3, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover the sum of \$105.26, the alleged purchase-price of certain goods claimed to have been sold by plaintiff to defendant, upon the promise of the latter to pay said amount to the Citizens' Insurance Company of Mobile, provided it should not suspend business or go into liquidation, or become insolvent within sixty days, and if either of those events happened, upon the further promise to pay said sum to the plaintiff.

The complaint alleged the making of said agreement, the delivery of the goods to the defendant thereunder, the insolvency of said insurance company within the period specified, a

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demand of payment and a refusal by defendant to pay. The answer was a general denial.

Further facts are stated in the opinion.

Benno Loewory for appellant. The agreement alleged to have been made by the defendant was absolutely void under the provisions of the Statute of Frauds, because it was not in writing and subscribed by the defendant. (*Jones v. Cooper*, 1 Cowp. 228; *Mallory v. Gillett*, 21 N. Y. 412; *Roe v. Barker*, 82 id. 431; *Watson v. Rundall*, 20 Wend. 201; *Burtis v. Thompson*, 42 N. Y. 246; *Allen v. Scarff*, 1 Hilt. 209; *Dixon v. Frazee*, 1 E. D. Smith, 32; *Cahill v. Bigelow*, 18 Pick. 369; *Cram v. Carville*, 5 Hill, 483; *Brady v. Sackrider*, 1 Sandf. 514; Comyn on Cont. [ed. 1835] 236; *Leonard v. Vredenburg*, 8 Johns. 29; Story on Cont. [3d ed.] 953; Smith's Mer. Law, 456; *Van Valkenburgh v. L. I. Co.*, 51 N. Y. 465; *Dows v. Sweett*, 134 Mass. 140.) The defense that this agreement is void under the Statute of Frauds, or for any other reason, is available, and such defense need not be specially pleaded. (*Duffy v. O'Donovan*, 46 N. Y. 223; *Cary v. W. U. T. Co.*, 15 N. Y. S. R. 204; *Porter v. Wormser*, 94 N. Y. 431.) The contract sued upon by the plaintiff is also void for lack of consideration. (*Folhurst v. Powers*, 39 N. Y. S. R. 582; *Mallory v. Gillett*, 21 N. Y. 412.) The defendant acted as an agent merely for the insurance companies, and this agency being well known to the plaintiff, the defendant cannot be held liable for any act performed or agreement made by him as such agent within the scope of his authority. (*Whitford v. Laidler*, 94 N. Y. 145; *Colvin v. Holbrook*, 2 id. 126; *Denny v. M. Co.*, 2 Den. 115.) The agreement testified to by the plaintiff and his witnesses was void as against public policy. (*Case v. Carroll*, 35 N. Y. 385; *Dutton v. Wilbur*, 52 id. 312; *R. R. I. & S. L. R. R. Co. v. Boody*, 56 id. 456; *Leonard v. Poole*, 114 id. 371; *Bell v. Leggett*, 7 id. 176; *Knowlton v. C. S. Co.*, 57 id. 518; *Arnot v. P. C. Co.*, 68 id. 558; *Foley v. Speir*, 100 id. 552; *Materno v.*

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Horwitz, 101 id. 469; *Keen v. Kent*, 4 N. Y. S. R. 431; *Goodrich v. Houghton*, 29 id. 905.) It is not shown anywhere by the evidence adduced on the part of the plaintiff that the contingencies upon which the defendant is sought to be made liable, to wit, the failure of the Citizens' Insurance Company of Mobile, or its insolvency or suspension of business, have ever occurred; and hence the plaintiff has not proven one of the material allegations of his complaint, and is, therefore, not entitled to a recovery. (*E. Bank v. Kaufmann*, 93 N. Y. 273; *Gates v. McKee*, 13 id. 232; *People v. Chalmers*, 60 id. 158; *Kingsbury v. Westfall*, 61 id. 356; *M. C. Works v. Schad*, 38 Hun, 71; 1 Greenl. on Ev. §§ 200, 201; *Law v. Merrills*, 6 Wend. 268.) The court below erroneously refused to charge that the witnesses Gregg, Gilbert, Hill, Landgraff and Miller were disinterested and unimpeached witnesses. (*Moran v. McLarty*, 75 N. Y. 25; Penal Code, § 579.)

Arthur Furber for respondent. The contract is an original undertaking on the part of defendant to take and pay for certain goods in a certain manner, and is not within the Statute of Frauds. (*Wales v. Stout*, 115 N. Y. 638; *Mallory v. Gillett*, 21 id. 412; *Milks v. Rich*, 80 id. 269; *Smart v. Smart*, 98 id. 539.)

VANN, J. Upon the trial it appeared that in January, 1887, the plaintiff was a dealer in men's underwear at No. 80 East Broadway in the city of New York. His stock of goods was insured to the amount of \$4,750 in four insurance companies, including the Citizens' of Mobile, and a loss having happened by a fire that occurred on the third of said month, one Sunshine, selected by the plaintiff, and the defendant, selected by the insurance companies, were duly appointed appraisers to estimate the damages, with power to select a third person as umpire if they could not agree. The appraisers met, but after much effort could not unite in making an award. The defendant had been instructed by the representative of all the

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companies to make the appraisal as brief as practicable, to avoid choosing an umpire, if possible, and if there were a few items that the appraisers could not agree upon, to allow them as a total loss and take the goods, which the insurers were authorized by their respective policies to do. Some damaged goods that cost \$500 were in fact delivered by the plaintiff to the defendant, who took them away, sold them and turned the proceeds over to the insurance companies, and on the trial he claimed that he did this as agent of the insurers, pursuant to their directions and under the provisions of the policies permitting it. On the other hand the plaintiff claimed that the defendant, in order to facilitate an adjustment of the disputed items of damage, purchased said goods for himself at their cost price, and in his own name and behalf promised to pay \$500 for the same to the several insurance companies in proportion to the amount of their respective policies, but as there was some doubt as to the financial condition of the Citizens' Insurance Company of Mobile, that he further promised that if that company should become insolvent, or fail within sixty days, he would pay its proportion, or \$105.26 to the plaintiff. The amount so to be paid to the companies was to be included in the award, as if the goods thus sold had been a total loss, and the plaintiff was to get his pay from all except the Citizens' company when the award was paid, and from that company also, unless it failed, in which event the defendant was to pay plaintiff directly for a proportionate part of the goods. Each party supported his theory by the direct and positive testimony of several witnesses, and the defendant's version was to some extent corroborated by documentary evidence. The jury, however, found for the plaintiff and, hence, the contract, even if unusual in form and improbable in fact, must, for the purpose of this appeal, be regarded as established in accordance with his theory. After the sale and delivery of the goods the appraisers made an award, which included said goods as totally lost, and each company, except the Citizens' of Mobile, paid its proportion of the award to the plaintiff.

The defendant claims that the agreement was a special

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promise by him to answer for the debt or default of the insurance companies, and that it was void, because not in writing. This depends on who bought the goods. If the insurance companies bought them, the debt thereby created was for them to pay and the promise of the defendant was to answer for their debt; but, as the jury have found, he bought the goods for himself, and hence the debt was his own. The promise was to pay for goods purchased by the defendant, not to pay any part of the damages caused by the fire. The agreement was not made by him in behalf of the companies, but in his own behalf. The companies did not elect to take the goods, but the defendant bought them of the plaintiff, who owned them at the time, and in consideration of the sale he promised to pay the price agreed upon to the appointees of the plaintiff, and so far as the amount in question is concerned, to the plaintiff, himself, in a certain contingency, which subsequently took place. The defendant was not to become liable upon the default of another, but was absolutely liable by the terms of the agreement. There was no original promise by one and a collateral promise by another, but a single promise made by the defendant for a consideration moving directly to himself. He did not agree to pay for the goods if the company did not pay for them, but to pay for them in any event, either to the company or to the plaintiff. The contingency mentioned did not affect his liability, but only the method of discharging it, as he was to pay the same amount whether it happened or not. So far as the purchase of the property is concerned, and that is all that there is here involved, there was only one debt, and that was never binding on the company, but on the defendant alone. We think that the contract, as the jury found it, was not within the Statute of Frauds. (*Mallory v. Gillett*, 21 N. Y. 412; *Leonard v. Vredenburg*, 8 Johns. 29; *Rector, etc., v. Teed*, 120 N. Y. 583, 588; *Wales v. Stout*, 115 id. 638; *Milks v. Rich*, 80 id. 269.)

The claim that there was no evidence that the Citizens' Insurance Company had failed is not well founded, for one of

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the witnesses testified to an admission of the defendant that he knew it had failed. There was other testimony on the same subject in favor of the plaintiff's theory, and no effort was made by the defendant to show that said company was solvent.

It is further claimed that the agreement, as testified to by the plaintiff and his witnesses, was void as against public policy, because the defendant had no right, while acting as an appraiser, to buy any part of the subject of the appraisal for himself. No such defense was pleaded in the answer and the question is raised by no exception taken upon the trial, but we are asked to consider it upon the ground that the court should, upon its own motion, refuse to enforce a contract if it is obviously opposed to the policy of the law.

The defendant, while acting as an appraiser, acted as a judge, and if the contract necessarily tended to bias his judgment or affect his impartiality in that capacity, it was doubtless void as against public policy. The contract, however, if performed according to its terms, could have had no such effect. The defendant, in his own behalf and not in behalf of the companies he represented, purchased damaged goods and agreed to pay what they were worth before they were damaged to the companies interested, in proportion to their interest. The purchase-price was included in the award on the same basis as if the goods had been a total loss, but as the companies were to receive the same amount from the defendant, they could lose nothing. On the other hand, the defendant would lose by the transaction, unless he could sell the unsound goods at their value if sound, or persuade, for he could not compel, the companies to reimburse him for the difference. In other words, he took upon himself the burden of loss, so far as the goods in question were damaged. To that extent, by force of the contract now attacked as illegal, the companies were in effect relieved of the obligation of their policies. Certain goods of the plaintiff had been damaged to the amount of \$1,134.50, which was agreed upon by the appraisers. Certain other goods worth \$500 at cost price had also been damaged, seriously as claimed by the plaintiff, but slightly as claimed by the defend-

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ant. The appraisers could not agree upon the amount of damage that these goods had sustained. In order to close the matter up, the defendant agreed to buy them of the plaintiff for \$500, and instead of paying that sum directly to him, to pay it to the companies, and include it in the award, making it \$1,634.

As stated by one of the witnesses, the defendant said to the plaintiff: "In order to close the damages, I am going to buy personally \$500 worth of goods, and in order that it should not appear to be crooked before the companies, I will divide it proportionately, according to the amount of insurance of each company. I will give them my check for it, and they in return will give you their check." In case one of the companies failed, he added: "I will give you my check for it at the expiration of the time." He was to pay the companies for the goods he took, and they were to pay the plaintiff. By no possibility could the defendant make anything out of the matter, and it was only by the voluntary action of the companies that he could be saved from loss. While we deprecate the tendency of any contract, however fair and honest it may be, whereby an arbitrator deals with the *rem adjudicandam*, we see nothing in the contract under consideration that necessarily is so opposed to public policy as to call upon us to interfere without an exception, because if the point had been raised upon the trial, it might have been shown that the purchase was made by the defendant with the knowledge and consent of all the insurance companies.

After examining all the exceptions to which our attention has been directed, we find no error requiring a reversal of the judgment, which should, therefore, be affirmed, with costs.

All concur, except FOLLETT, Ch. J., and LANDON, J., dissenting.

Judgment affirmed.

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In the Matter of the Application of the TRUSTEES OF THE IMPORTERS AND GROCERS' EXCHANGE of New York for a Voluntary Dissolution.

HENRY F. HITCH et al., Petitioners, Respondents, v. HENRY E. HAWLEY et al., Objectors, Appellants.

A corporation organized under the act of 1877 (Chap. 228, Laws of 1877), providing for the organization of exchanges or boards of trade, may be dissolved by the court upon petition and consent of a large majority of its trustees and members, when it appears that it is doing no business, because of the diverse interests of its members, although the corporation is solvent and a minority of the trustees and members oppose the dissolution. (Code Civ. Pro. §§ 2419-2432.)

When it appears that the interests of the stockholders of such a corporation are so discordant as to prevent efficient management, and that a large majority of its trustees and members wish to wind up its affairs by a dissolution, the fact is established that the dissolution will be for the interests of the stockholders.

(Argued February 8, 1892; decided March 15, 1892.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made December 19, 1889, which reversed an order of Special Term denying the application for dissolution and granted the motion to dissolve.

This was a special proceeding for the dissolution of a corporation organized August 21, 1883, pursuant to chapter 228 of the Laws of 1877, under the corporate name of the "Importers and Grocers' Exchange of New York," to continue for the period of fifty years.

The proceeding was initiated by the petition of a majority of the trustees and the practice pursued, as to which no question is raised, was that prescribed by sections 2419 to 2432 of the Code of Civil Procedure. From the report of the referee, to whom it was referred to take the proofs and determine the facts, it appeared that the object of the corporation, as set forth in its charter certificate, was "to foster trade and commerce in

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groceries and East Indian and South American products; to protect such trade from unjust and unlawful exactions; to reform abuses in such trade and diffuse accurate and reliable information among its members; to produce uniformity and certainty in the customs and usages of the trade in said merchandise; to settle differences between the members of said corporation arising out of the trade in said merchandise, and to promote a more enlarged and friendly intercourse between merchants engaged in said trade and generally to increase the facilities for conducting the trade in groceries and East Indian and South American products." The amount of the capital stock was \$3,750, divided into fifteen shares of \$250 each, one share being held, *ex officio*, by each of the fifteen trustees, and upon the expiration of his term of office, passing under the by-laws to his successor. The members were elected by the trustees and each one was required to pay an initiation fee of \$250, until the number equaled one hundred, after that \$500, until there were two hundred, and after that \$1,000. The certificates of membership are transferable, provided the transferee is approved by the committee on membership and the governing committee. There are now 220 certificates outstanding, held by 216 members. The Exchange began work in November, 1883, occupying commodious rooms, furnished with black-boards, call stands and all the usual appliances for the convenient transaction of the business of an exchange. The annual rental was \$7,000 and the salary roll nearly as much more. The attendance at first was large and much business was done, chiefly in teas and sugars for future delivery. Speculation in tea was so active that prices gradually rose from nineteen to thirty-four cents a pound, but the market became demoralized in consequence, failures resulted, business ran down, the attendance fell away and all efforts at resuscitation were in vain. From November, 1883, to December, 1884, inclusive, the transactions in tea amounted to more than forty-five million pounds; in sugar to nearly sixty thousand tons, besides about forty thousand barrels, and in hemp, to nine hundred bales. The decline

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began with the collapse caused by speculation in March, 1884, and gradually continued until May 1, 1885, and since then there have been no transactions on the Exchange. In May, 1884, steps were taken to reduce expenses, and in March, 1885, cheaper, though large and convenient, rooms were occupied. In April, 1886, the Exchange removed to small and inconvenient rooms that rented for \$450 a year, and in February, 1887, a part of these was surrendered, and since then the rent has been \$300 per annum, and the salary roll \$15 per week. As early as June, 1885, a move was made to wind up its affairs. At the annual election in 1885 one hundred and eighteen votes were cast, and in 1886 only thirty-four. In April, 1887, the governing committee, composed of the officers and trustees, unanimously resolved to take the necessary legal steps for a dissolution, and appointed a committee for that purpose. Nine out of the fifteen trustees verified the petition by which this proceeding was commenced, and three trustees served an answer. Thirteen members of the present governing committee and 131 holders of certificates of membership either petitioned for a dissolution or testified on the trial that in their opinion it was for the best interest of the members to wind up the Exchange. The opposition is headed by two members and one ex-member of the governing committee, and consists entirely of those interested in the tea trade, but does not include all who are thus engaged. Ten members testified that they were opposed to dissolution, because it furnished the following benefits to the tea merchants: Combined action in state and legislative matters; reliable standards of values; uniform telegraphic and other trade information; accurate monthly statements of teas received and delivered, showing the consumptive demand; machinery to settle disputes as to packing, cooperage and the condition of teas; the establishment of regular warehouse charges, and "the ability to issue certificates of tea upon which money could be borrowed, as collateral." The referee found that such benefits accrued to the tea people from the organization of the Exchange, but that none of those benefits now exist, except

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the collection and publication of statistics of the amount of tea received and in warehouses. He also found that the Exchange has outlived its usefulness; that no business has been done there for a long time past, and that business cannot be successfully conducted there; that the great majority of all the members desire its dissolution, and that a trust fund, accumulated from the sale of certificates of membership, and amounting to \$69,648.68, is lying idle, and the members desire to receive their respective shares thereof. There are no debts against the corporation, except a small amount for current expenses. The governing committee is elected by the members of the Exchange, and as a large majority desire a dissolution they elect a committee in favor of that course. In the spring of 1886 the trustees prohibited calls of merchandise and refused to furnish standards of tea unless they were paid for by subscription, although without them business in tea cannot be successfully done upon the Exchange. The main reason why sugar was not dealt in is because the sugar business was largely in the hands of the sugar refiners, who refuse to deal on the Exchange or to purchase sugar bought or sold there. The referee found expressly that it was for the interest of the objecting members, or of those engaged in the tea trade, that the corporation should not be dissolved, and by implication that it was for the interest of all the others, many more than half, that it should be dissolved.

The Special Term denied the application and dismissed the proceeding upon the ground that the Code does not require a dissolution when it would be beneficial to a majority of the stockholders, but injurious to a minority. (2 N. Y. Supp. 257.) Upon appeal to the General Term this order was reversed, the report of the referee confirmed and a decree made, which after reciting that "it appearing to the court for the reasons stated in the said report of the referee, that it will be beneficial to the interests of the stockholders and members and not injurious to the public interests, if a dissolution is ordered," dissolved the corporation, appointed a receiver of all its property and directed a distribution of the net proceeds among

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the members in proportion to the amounts paid by them respectively for their certificates of membership. (8 N. Y. Supp. 319.)

Frank E. Blackwell for appellants. This exchange is not a corporation contemplated by the Code of Civil Procedure, that is, it clearly was not in the minds of the law makers when the provisions in regard to dissolution were enacted. (Code Civ. Pro. § 2429.) Had the Code intended to provide that the interest of a majority of the stockholders should control, it would have said so, but it clearly contemplated a case where it was for the interest of all the stockholders that the corporation should be wound up. (*In re E. M. B. S. & F. Co.*, 34 Hun, 371; *In re P. M. Co.*, 29 id. 430; Code Civ. Pro. § 2429.) The right of a majority of the stockholders or members to surrender the charter of a corporation, or even to do an act having the effect of a surrender, has always been denied in this state. (*Denike v. N. Y. & R. L. Co.*, 80 N. Y. 606; *In re S. Assn.*, 15 Civ. Pro. Rep. 215; *Abbott v. A. H. R. Co.*, 11 Abb. Pr. 204; 33 Barb. 578; *Ward v. Soc. of Attys.*, 1 Colly. 370; *In re N. Ins. Co.*, 1 Paige, 258; *Kean v. Johnston*, 9 N. J. Eq. 401; *Curren v. Santini*, 16 La. Ann. 27; *P. S. Lodge v. Santini*, Id. 53; *M. & O. R. R. Co. v. State*, 29 Ala. 586, 587; *N. O., J. & G. N. R. R. Co. v. Harris*, 27 Miss. 540; *In re P. M. Co.*, 29 Hun, 430.) By the terms of the articles of incorporation it was provided that "the term of existence of said corporation is to be fifty years." To alter the period of fifty years would be to impair the obligations of this contract. (*Black v. D. C. Co.*, 22 N. J. Eq. 403, 404, 405, 415, 416; *Livingston v. Lynch*, 4 Johns. Ch. 573.)

James Proctor Clarke for respondents. This corporation comes within the provisions of title 11, chapter 17, voluntary dissolution, of the Code. (Code Civ. Pro. §§ 2419, 2431; *In re A. D. F. Assn.*, 22 Abb. [N. C.] 234.) The mere fact that there is a minority opposed to dissolution is not a bar to the proceeding. (Code Civ. Pro. §§ 2419, 2420, 2429.) The fact that fifty years is stated in the certificate of incorporation as

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the life of the corporation is of no effect. (Morawetz on Corp. § 418; 2 Pars. on Cont. § 569; 3 id. 532; *People v. G. M. L. Ins. Co.*, 91 N. Y. 174; *People v. O'Brien*, 111 id. 1; Code Civ. Pro. §§ 2419, 2429.)

VANN, J. The question presented by this appeal is whether the court has power to dissolve a corporation organized as an exchange, when it is solvent but doing no business, owing to the diverse interests of its members, upon the petition and consent of a large majority of its trustees and members, in opposition to the wishes of a small minority of both? Whether courts of equity have inherent power to dissolve corporations, as has been held in some jurisdictions but denied in others, it is unnecessary for us to consider, as the method of effecting corporate dissolution, when prescribed by statute as in this state, is exclusive, and must be substantially followed. (*Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *Kohl v. Lilienthal*, 81 Cal. 378; *Spelling on Private Corporations*, § 1008.)

The earliest legislation upon the subject, to which our attention has been called, is an act passed in 1817, which authorized the dissolution of incorporated insurance companies, provided the directors, or a majority thereof, presented a petition stating, among other things, that they deemed it necessary or beneficial to the interests of the stockholders; and provided also, that no sufficient cause against dissolution should be shown to the chancellor, "he having due regard to the interests of the stockholders and all persons interested." (L. 1817, ch. 146, §§ 1 to 4.)

The Revised Statutes authorized the Court of Chancery to dissolve any corporation, with certain exceptions not now material, upon the petition of the directors, trustees or other officers having the management of its concerns, or a majority of them, provided it was either insolvent, or if for any reason a dissolution thereof would be beneficial to the stockholders and not injurious to the public interest. (3 R. S. [6th ed.] p. 752, §§ 73-80.)

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In 1876 the Supreme Court was authorized, "in its discretion," to dissolve any corporation organized under the Manufacturing Act, provided the trustees consisted of an even number of persons and they were equally divided as to the management of its affairs, and provided that one-half of the stockholders favored the course of one division of the trustees and the other half that of the other. [L. 1876, ch. 442, p. 474.] No ground of action was prescribed, and the power was to be exercised at the discretion of the court. The statute now regulating the subject consists of sections 2419 to 2432 of the Code of Civil Procedure, upon which this proceeding was founded. It applies to all corporations created by or under the laws of this state, except those of a religious, educational, municipal or political character. [§ 3431.] The proceeding may be commenced by the petition of a majority of the directors, trustees or other officers in control, if the corporation is insolvent, or if, for any reason, the petitioners deem it beneficial to the interests of the stockholders that it should be dissolved. (§ 2419.) If the trustees and stockholders are equally divided in respect to the management, one or more of the trustees or directors may present the petition, but this clause does not apply to savings banks, trust, safe deposit, railroad, banking or insurance companies. (§ 2420.) Upon the presentation of a petition showing these jurisdictional facts, as well as some others relating to the condition of the corporation, certain courts are authorized to issue and publish an order to show cause, and upon the return thereof to hear, or refer for hearing, the proofs and allegations of the parties, and to make a final order dissolving the corporation if it appears to the court that it is insolvent, or "that for any reason a dissolution" thereof "will be beneficial to the interests of the stockholders and not injurious to the public interests." (§§ 2421 to 2430.)

The history of legislation upon the subject shows that prior to 1876 it was the policy of the legislature to authorize the courts to act upon the petition of a majority of the trustees, but the basis of action, except in the case of insolvency, was the interest of the stockholders. Division of opinion on the

part of the trustees as to business policy does not appear to have been recognized by the legislature as an element requiring attention until they provided by the act of 1876 that if the trustees and members were equally divided "as to the management of the affairs of the corporation," the application to dissolve might be made by "the trustees, or any or either of them." This feature is reproduced by section 2420 of the Code, and it indicates that in the opinion of the legislature dissension as to the management, especially when it might result in a deadlock, so that business could not be done efficiently, was sufficient to authorize action by the courts. Where, however, a majority of the trustees favor dissolution "for any reason," whether relating to the management or not, and it appears that "for any reason" a dissolution "will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation." (§ 2429.) As it is not claimed that the public interests are here involved, the only question is whether the facts permitted the conclusion that a dissolution would benefit the stockholders. In this case the members were the stockholders, as they owned the stock, but for convenience permitted the trustees to hold it, *ex officio*. The statute, moreover, as amended in 1884, provides for the case of corporations that have no stockholders, but simply members. (§ 2431.) As to what would be beneficial to the interests of the stockholders, it is clear that the opinion of a majority of the trustees, who are presumed to represent the wishes of a majority of the members, is of primary importance, because it is essential to the jurisdiction of the court and must be set forth in the petition. (§§ 2419 and 2429.) The legislature doubtless thought that the stockholders would be the best judges as to their own interests and that if there was a difference of opinion the judgment of the majority would be more apt to be right than that of a minority. This case, however, is peculiar, because the interest of the stockholders was not uniform. The object of the exchange was so broad as to include several diverse interests, so that while the dealers in one commodity would make,

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the other dealers would lose by its continuance in business. Under these circumstances would a dissolution be beneficial to the interests of the stockholders, within the meaning of the statute? The benefit meant is a pecuniary benefit, either direct or indirect. The exchange cannot be carried on so as to be of material use to any one without the annual expenditure of a large sum of money, to be taken from the surplus, or raised by compulsory assessment, as the by-laws provide. Is it to be expected that the majority, having full control of affairs, will conduct the business efficiently at an actual loss and without any benefit to themselves? The history of the corporation in question shows that while it maintains its organization, keeps open rooms and furnishes some facilities for the transaction of business, they are utterly inadequate to an effective exchange, and that as now conducted it is of no appreciable benefit to any one. It is practically a failure, because, owing to diversity of views and interests, it does not accomplish the object for which it was formed. Is there any reason to expect an improvement if this proceeding is dismissed? None, in the nature of affairs, because the majority will not and cannot be compelled to tax themselves to the extent necessary to maintain an adequate and useful exchange. If they can be forced to maintain an exchange, they cannot be forced to maintain an efficient exchange, as they can lawfully refuse to raise or expend enough money for that purpose. If they see fit to reduce expenses by hiring cheap rooms, furnishing poor facilities, dispensing with cable telegrams and reliable tea standards, both of which cost a good deal, the law cannot interfere, because it has committed control of such matters to the trustees, elected by the votes of a majority of the members. So action in state and legislative matters, daily calls of merchandise, the making and enforcement of rules to settle disputes, establish warehouse charges and govern the issue of tea certificates, together with all of the benefits accruing to the tea merchants from an enterprising exchange, are necessarily under the control of the majority, who cannot be compelled to be liberal, zealous or wise. All questions relating

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to the management that call for the exercise of judgment or discretion, must be decided by the trustees or members, acting through a majority. Hence an association that is useful to one class of its members, but injurious to another, will be useless to both, as long as the latter is in control.

We think that when the interests of the stockholders of a corporation are so discordant as to prevent efficient management and a large majority of both trustees and members wish to wind up its affairs, a dissolution thereof will be beneficial to the interests of the stockholders, because the object of its corporate existence cannot be attained. (*In re Niagara Ins. Co.*, 1 Paige, 258; *In re Woven Tape Skirt Co.*, 8 Hun, 508; *Webster v. Turner*, 12 id. 264; *Denike v. N. Y. & R. Lime & Cement Co.*, 80 N. Y. 599, 605; 2 Beach on Private Corporations, § 781; 1 Morawetz on Corporations, § 413; 2 Waterman on Corporations, § 420; 2 Spellman on Corporations, § 1012.)

Under such circumstances it is better for all that a dissolution should be ordered, so that the minority may reincorporate upon some more practicable basis, if they so desire, and the majority may no longer be forced to keep up a feeble and useless organization, in which they take no interest and from which they derive no benefit.

We are of the opinion that the determination of the learned judges of the General Term was right and that their order should be affirmed, with costs.

All concur.

Order affirmed.

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HENRY W. EMBLER, Respondent, v. THE TOWN OF WALLKILL,
Appellant.

Plaintiff, while riding upon a load of hay along one of defendant's highways, was injured by being swept from the load by the limbs of a tree, which overhung the traveled track. On trial of an action to recover damages on the ground of alleged negligence of defendant's commissioners of highways, the court charged as follows: "Notice must be proven of the existence of the obstruction a sufficient length of time, from which a jury may say a commissioner ought to have known it. Now it is nothing of any consequence that thousands have passed there without injury. If this obstruction existed so long that a vigilant officer should have known of its existence, they are liable." In accordance with requests of defendant's counsel, the court then charged in substance that the jury had a right to take into consideration, in determining whether the commissioners were chargeable with notice, the fact that people driving on loads of hay had passed under this tree without difficulty; also the fact that no complaint had been made to the commissioners. Said counsel then excepted to the sentence in the charge that "it is nothing of any consequence that thousands passed there without injury." *Held*, untenable.

It appeared that, before the time of the accident, a city was incorporated which embraced territory belonging to the town, and that the commissioners of highways, for whose negligence the town was sought to be made liable, were elected before the incorporation by electors of the town, including those who resided within the present limits of the city. Defendant claimed that the city was jointly liable, and should have been made a party. *Held*, untenable.

It appeared that defendant had occasionally traveled on this highway, but never before on a load of hay, and he testified that he never had had occasion to observe how low the branches of the apple tree hung, or how far they extended. Defendant's highway commissioners gave testimony to the effect that they had never known any difficulty from said tree, and that any danger therefrom was not obvious to them. Defendant claimed that the danger was so apparent that plaintiff and the driver of the load were, as matter of law, chargeable with contributory negligence. *Held*, untenable.

Reported below, 57 Hun, 384.

(Argued February 10, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of

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plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William Van Amee for appellant. Trees upon a country highway do not constitute an obstruction which it is the duty of the commissioners to remove. (Laws of 1869, chap. 322; Laws of 1888, chap. 196.) A different rule prevails in reference to objects which have become familiarized to the public by universal custom and acquiescence from that which applies to unusual, unforeseen and unexpected objects. (*City of Allegheny v. Zimmerman*, 95 Penn. St. 287; *City of Wellington v. Gregson*, 31 Kan. 99.) In this case the public authorities simply gave their official support to a custom which they found in operation. Their action constituted a scheme in the construction and maintenance of the highway, for any defects in which the town is not liable. (*Monk v. Town of New Utrecht*, 104 N. Y. 552; *Urquhart v. City of Odgensburgh*, 91 N. Y. 67.) This case comes within the principle that one who does not avoid a known danger or obstruction is guilty of contributory negligence. (*Dubois v. City of Kingston*, 102 N. Y. 219; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *Bond v. Smith*, 113 id. 378; *Williams v. D., L. & W. R. R. Co.*, 116 id. 628; *Palmer v. P. Co.*, 111 id. 488; *Durkin v. City of Troy*, 61 Barb. 437; *Hinz v. Starin*, 46 Hun, 526; 3 N. Y. Supp. 290; *Krum v. Anthony*, 8 Atl. Rep. 598; *Lanigan v. N. Y. G. L. Co.*, 71 N. Y. 29; *Wilson v. City of Charleston*, 90 Mass. 137; *Hart v. Grennell*, 122 N. Y. 371.) Even if the plaintiff had not been familiar with the locality, the duty rested upon him to be upon the lookout for defects and to use ordinary care in avoiding any possible dangers. (*Fogg v. Nahant*, 98 Mass. 578; *Brow v. Mayor*, 57 Mo. 156; *Robb v. Connellsville*, 137 Penn. St. 42.) Assuming that the plaintiff saw that his head would not clear the branches, it was his duty to stop or dismount. If he did not see, he was guilty of negligence in not looking. (*Dewire v.*

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Bailey, 131 Mass. 169.) It was error to submit the question to the jury as to whether the town under these circumstances, was liable for the injuries complained of. (Angell on Highways, § 259.) The court erred in refusing to grant a nonsuit on account of the non-joinder of the city of Middletown as a party defendant. (Laws of 1888, chap. 535.)

W. F. O'Neil for respondent. The court properly left it as a contested question of fact for the jury to determine whether, under all the circumstances attending the accident, the plaintiff or his driver were guilty of negligence. (*Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464.) Defendant's contention that the trial court should have dismissed the complaint on defendant's motion, because Travis had seen the tree and saw it on the morning of the accident and was, therefore, as a matter of law negligent in driving under it, is untenable. (*Weed v. Village of Balston Spa*, 76 N. Y. 333; *Bullock v. Mayor, etc.*, 99 id. 656; *Peil v. Reinhart*, 127 id. 381; *Greany v. L. I. R. R. Co.*, 101 id. 419; *Boyce v. M. R. R. Co.*, 118 id. 314; *Sherry v. N. Y. C. & H. R. R. Co.*, 104 id. 652.) That overhanging limbs are common on highways, makes them none the less an obstruction where they interfere with public travel, or cause injury to a person passing over the public road. (*Sewell v. City of Cohoes*, 75 N. Y. 45.) It was not necessary to join the city of Middletown as a party defendant. (Laws of 1872, chap. 46, § 1; Laws of 1888, chap. 535, § 1; *Gertrum v. Bd. Suprs.*, 109 N. Y. 176.) If the charge on the whole conveys to the jury the correct rule of law upon a given question, the judgment will not be reversed by the appellate court for technical error in verbiage. (*Caldwell v. N. J. S. Co.*, 47 N. Y. 282; *Rexter v. Starin*, 73 id. 601.)

FOLLETT, Ch. J. The action was brought to recover damages for personal injuries sustained by being swept from a load of hay to the ground by the limbs of an apple tree which overhung the public highway extending from the village of Circleville, in the town of Wallkill to the city of Middletown,

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formerly part of the same town. Circleville is about five miles northerly of the city of Middletown and they are connected by this highway which is one of the principal ones leading to and from the city. February 20, 1889, the plaintiff was drawing a load of hay from Circleville to Middletown by a team driven by Emmett Travis. The day was cold, the highway icy, rough with deep wagon ruts and narrow at the place of the accident. About a mile south of Circleville there was an old apple tree the trunk of which stood from eight to thirteen feet from the west side of the traveled track. The plaintiff was riding on the right hand side of the load with his back to the driver when he was brought against a limb of the tree. One of the highway commissioners testified that the limb by which the plaintiff was struck was but four feet from the center of the road and that it was but seven feet from the center of the road to the ditch on the east or opposite side of the highway.

At the close of the plaintiff's case the defendant moved for a nonsuit on the sole ground that the plaintiff and his driver by their negligence contributed to the injury. The motion was denied and the defendant excepted. At the close of the evidence this motion was renewed upon the same ground, and upon the further ground that the town of Wallkill was not solely liable for the damages, which motion was denied and the defendant excepted. In discussing the question whether the commissioners of highways were guilty of negligence the court said: "Notice must be proven of the existence of the obstruction a sufficient length of time from which a jury can say a commissioner ought to have known it. *Now, it is nothing of any consequence that thousands passed there without injury.* If this obstruction existed so long that a vigilant officer should have known of its existence, they are liable because they didn't know. They should have known as public officers if it existed so long that a jury could say to them "you should have known it."

At the close of the charge, defendant's counsel asked the court to instruct the jury "that the jury have a right to take

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into consideration the circumstance that people driving on loads of hay had passed under this tree without difficulty, in determining whether there was sufficient to charge the commissioners with notice of the alleged defect." To this request the court replied: "It might be some evidence." Defendant's counsel also asked the court to charge that the jury have a right to take into consideration the circumstance that no complaint was made to the commissioners, in determining whether they were charged with notice of the alleged defect. The court replied: "Yes, I will charge that." The counsel then excepted to the sentence "Now, it is nothing of any consequence that thousands passed there without injury." This remark was made while discussing the negligence of the commissioners and the court very clearly gave to the fact that many had passed the tree without injury all of the probative force that it was entitled to on this issue.

Whether the evidence of negligence on the part of the commissioners was sufficient to authorize the submission of the question of their negligence to the jury is not presented by any exception. The only question presented by this record is whether the plaintiff by his own negligence or by that of his driver contributed to the accident. The defendant now insists that the tree having stood for so many years in this position with its limbs overhanging a portion at least of the traveled part of the highway that it was contributory negligence on the part of the plaintiff not to have known of it and avoided it. The record shows that the plaintiff had occasionally traveled this highway but never before with a load of hay, and he testified that he never had had occasion to observe how low the branches hung or how far over the beaten track they extended. The defendant has three commissioners of highways all of whom gave evidence to exculpate themselves from the charge of negligence. Daniel W. Shaw testified that he had been commissioner for ten years or over, lived within a mile and a half of this tree but never noticed that its branches overhung the road. Charles E. Gardner testified that he was one of the commissioners at the time of the accident, and had

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been for twelve years, but had never known of any difficulty about the tree. Henry W. Dunning, the third commissioner, testified that he had been in office six years and did not know that any person had difficulty in passing the tree with loads of hay. Notwithstanding this evidence, that danger was not obvious to those whose duty it was to see and guard travelers against it, the defendant insists that the danger was so apparent that it should be held as a matter of law that the plaintiff and his driver were guilty of contributory negligence in not seeing and avoiding it, and that it was error to submit to the jury the question of contributory negligence. The position that whether the plaintiff and his driver, by their negligence, contributed to the injury, was a question of law for the court and not a question of fact for the jury, cannot be sustained.

The point is made that the city of Middletown should have been joined as a party defendant. June 9, 1888 (C. 535, L. 1888), the city of Middletown was incorporated. Before that date the town of Wallkill embraced the territory which, at the time of the accident was, and since has been, within the limits of the city. Before the act incorporating the city was passed the three highway commissioners, for whose negligence the town is sought to be held liable, were elected by the electors of the town, including those who resided within the present limits of the city. It is urged that because the electors who resided within the territory which now forms part of the city, participated in the election of the three commissioners that the city is jointly liable with the town for their neglect. This point is without foundation. At the time of the accident the defendant was duly incorporated and its limits have not since been changed, and the town is liable for the neglect of its commissioners, no matter how they were chosen or appointed. They were the legal highway officers of the town, and the fact that they were elected by voters not now voters of the town has no effect upon the liability of the defendant.

The judgment should be affirmed, with costs.

All concur, except HAIGHT and LONDON, JJ., dissenting.

Judgment affirmed.

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WILLIAM G. DAVIDSON, Respondent, v. JOHN M. CORNELL
et al., Appellants.

It seems that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service, with knowledge of the character of defective structures and of the dangers which may be apprehended, he assumes the hazards incident to the situation.

Where, however, although the defect is apparent, it may require skill and judgment, not possessed by ordinary observers, or by the servant, to give knowledge of hazards which may be apprehended therefrom, he does not assume those hazards.

Defendants were engaged in constructing an elevated railroad; they used for this work a steam engine and apparatus placed upon a platform on wheels, which moved along as the work progressed, upon girders resting upon cross-beams. While the platform was being moved forward the girders on which it rested gave way and the end of the platform fell to the ground. Plaintiff, an employe of defendants, at work upon the platform, where he had been employed for some time previously, was injured. In an action to recover damages plaintiff's evidence tended to show negligence on the part of defendants in not properly bracing the girders laterally, or bolting them to the cross-beams. *Held*, that while the alleged defects were apparent, yet as plaintiff, although having knowledge thereof, might not have been advised of the dangerous consequences that might result therefrom, and to give knowledge thereof, may have required some skill or judgment not available to him or to an ordinary observer, such consequences were not as matter of law obvious and within the hazards assumed, and the question of plaintiff's contributory negligence was one of fact for the jury; and so, that a motion for a nonsuit was properly denied.

While statements of a person injured, expressive of his present condition, made to a physician for the purpose of treatment, may be proved in his behalf, statements made as to the past, *i. e.*, as to pains which he had suffered or disabilities he had labored under, are not competent, and error in receiving such statements is not cured by testimony on his part that such statements were true.

(Argued February 1, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 23, 1890, which affirmed a judgment in favor of the plaintiff entered upon a

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verdict, and also affirmed an order denying a motion for a new trial.

The action was brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendants, who were engaged in the construction of a double-track elevated railway on Broadway in the city of Brooklyn. This was done by setting columns upright on either side of the street opposite each other in transverse lines and longitudinally about sixty feet apart, placing upon them iron cross-beams which supported girders, four in each span, extending from one to another of those cross-beams. And for the purpose of hoisting those long girders from the ground to their places in the structure, there was used a steam engine, boiler and other apparatus upon a platform on wheels. This was in the evidence designated as a "traveler." It was about twenty feet in width and about thirty feet in length, on twelve wheels, three resting on each of the four girders, and its weight was from ten to twelve tons. In advance of this traveler, and disconnected from it, were two derricks or cranes, called by the witnesses "grasshoppers," also on wheels. In hoisting a girder, the rope to which the tackle was attached led from it through the top of the crane, thence back to the traveler, where, by the power of the engine, it was wound about a drum, thus raising the girder to its place on the cross-beams. When the four girders, constituting a single span, were thus hoisted and bolted, the grasshoppers were taken onto that span, and the traveler, by means of a rope and tackle attached, fastened by a clamp to one of the inner longitudinal girders some distance in advance of it, and the application of the power of the engine was moved forward onto and near the forward end of the span of girders next in the rear to that on which the grasshoppers rested, there stopped, and by the use of chocks stayed, and another span of girders hoisted to their places. By this method of construction, the work had proceeded nearly one mile, when on February 14, 1888, the traveler, while being so moved, and the girders on which it rested, fell to the ground, causing the injury to the plaintiff of which he complains. He

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was an employe of the defendants upon the traveler, and had been there so engaged for some time. He recovered \$2,500. The judgment was affirmed by the General Term.

Further facts are stated in the opinion.

James Troy for appellants. The admission of the conversation between the plaintiff and Dr. Corey was clearly error. (*Roche v. B., C. & N. R. R. Co.*, 105 N. Y. 294; *Ryan v. P. M. Co.*, 57 Hun, 253.) The testimony as to the manner of constructing the Sands street road after the accident on the Broadway road, was improperly admitted. (*Johnson v. M. R. Co.*, 52 Hun, 111; *Simpson v. M. R. Co.*, 17 N. Y. S. R. 68; *Dougan v. C. T. Co.*, 56 N. Y. 8; *Bund v. Daly*, 68 id. 557; *Satters v. D. & H. C. Co.*, 3 Hun, 339; *Dale v. D. & W. R. R. Co.*, 73 N. Y. 472.) It was erroneous for the court to charge the proposition which rendered defendants liable for consequences against which their knowledge, best skill, judgment and experience was unable to guard, and it was erroneous for the court in its charge to exclude the effect of contributory carelessness. (*Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 566; *Warner v. E. R. R. Co.*, 39 id. 468; *DeGraaf v. N. Y. C. & H. R. R. Co.*, 76 id. 125; *Leonard v. Collins*, 70 id. 90; *Slater v. Jewett*, 85 id. 62; *DeForest v. Jewett*, 88 id. 264; *Hussey v. Cooger*, 112 id. 614; *Hays v. F. S. & G. S. R. R. Co.*, 97 id. 259; *Baulec v. N. Y. & H. R. R. Co.*, 59 id. 357; *Dwight v. G. Ins. Co.*, 103 id. 341; *Lafflin v. B. & S. W. R. R. Co.*, 106 id. 139; *Loftus v. U. F. Co.*, 84 id. 455; *Dougan v. C. T. Co.*, 56 id. 1; *Feltham v. England*, L. R. [2 Q. B.] 33; *Creegan v. Marston*, 126 N. Y. 568; *Cullen v. Morton*, Id. 1; *Butler v. Townshend*, Id. 105; *Filbert v. D. & H. C. Co.*, 121 id. 257; *Kelly v. F. S. S. R. R. Co.*, 58 Hun, 93.)

Chas. J. Patterson for respondent. The defendants were guilty of negligence in failing to take the precautions which were usually taken in such work to render the structure safe and secure before subjecting it to the heavy strain of moving the traveler over it. (*Pantzar v. T. F. I. M. Co.*, 99 N. Y.

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368; *Nichols v. B. & D. Co.*, 33 Hun, 137; 117 N. Y. 646; *Vredenberg v. N. Y. C. R. R. Co.*, 14 id. 582; *Ford v. Lyons*, 41 Hun, 512; *Ryan v. Fowler*, 24 N. Y. 410; *Kranz v. L. I. R. R. Co.*, 123 id. 1; *Buckley v. P. H. I. O. Co.*, 17 N. Y. S. R. 436; 117 N. Y. 645.) The defendants were also under an obligation to provide a plan for the construction of the roadbed which, if it was faithfully carried out by their employes, would have resulted in the safety of the structure. (*Abel v. D. & H. C. Co.*, 103 N. Y. 581; *Sheehan v. N. Y. C. R. R. Co.*, 91 id. 332; *Cambell v. R. R. Co.*, 35 Hun, 506; *Whittaker v. D. & H. C. Co.*, 126 N. Y. 544; *McGovern v. C. V. R. R. Co.*, 123 id. 280; *Bulkley v. P. H. I. O. Co.*, 17 N. Y. S. R. 436; 117 N. Y. 645.) The plaintiff was not guilty of contributory negligence, nor did he assume the risks which arose from the failure of defendants to perform their duty to make the structure safe for the workmen. (*Kain v. Smith*, 89 N. Y. 375; *Grizzle v. Frost*, 3 F. & F. 622.) The statements made by plaintiff to Dr. Corey, in connection with the examination which the latter made of plaintiff's physical condition, were admissible in plaintiff's favor. (*Meeham v. M. R. Co.*, 115 N. Y. 647; *Matteson v. N. Y. C. R. R. Co.*, 35 id. 487; *Reed v. N. Y. C. R. R. Co.*, 45 id. 574; *Roche v. B. C. & N. R. R. Co.*, 105 id. 294; *Cleveland v. N. J. S. B. Co.*, 5 Hun, 523; *Fay v. Harlan*, 128 Mass. 241; *Kent v. Lincoln*, 32 Vt. 591; *Earl v. Tupper*, 45 id. 275; *Collins v. Waters*, 45 Ill. 485; *Towle v. Lake*, 48 N. H. 92; *State v. Gedicke*, 43 N. J. L. 86; *Bridge v. Oshkosh*, 67 Wis. 195; *Quaife v. C. N. & W. R. Co.*, 48 id. 513; *Ropers v. Cram*, 30 Tex. 195.) The servant does not assume the risk arising from the master's neglect. (*Stringham v. Stewart*, 100 N. Y. 516; *Pantzar v. T. F. I. M. Co.*, 99 id. 368; 117 id. 645; *McGovern v. C. R. R. Co.*, 123 id. 280.) The charge that if the accident would not have happened but for defendant's negligence, then the fact that negligence of a co-employee helped to bring it about would not be a defense, is good law. (*Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546.)

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BRADLEY, J. The immediate cause of the giving way of the girders and the fall of the structure was the subject of some contention upon the evidence.

The plaintiff's counsel contends that it was the result of the negligent failure of the defendants to perform their duty to their employes, in that they did not use the care imposed upon them to provide a reasonably safe structure for the men to work upon, or proper means for its support or movement for the purposes of the service required. If that proposition, in its application to the cause of the calamity in question, had the support of evidence, the charge of negligence on the part of the defendants was sustained. (*Ryan v. Fowler*, 24 N. Y. 410; *Pantzar v. Tilly Foster Mining Co.*, 99 id. 368; *Kranz v. Long Island Ry. Co.*, 123 id. 1.)

There is no question about the competency of the men to perform the duties devolved upon them in the service. The charge of negligence against the defendants has relation mainly to the system provided for the performance of the work of construction in which the plaintiff was engaged, and is, that there was a want of reasonable care in furnishing precautionary means for the safety of the employes upon it. The structure, called the traveler, containing the engine, boiler and other appliances, was moved on the girders from one cross-beam to another, having the weight of ten to twelve tons, and required a substantial support. In this instance, for some cause, it is said, the girders swayed as the traveler was moving along upon them, and they, with it, fell to the ground. There was no lateral bracing placed between the girders before this weighty structure, called the traveler, was moved over them. Nor were the ends at the bottom bolted. The upper portion of each end of the girders extended beyond the lower portion, and when it projected onto the cross-beams, where it rested on a seat plate and was held by two bolts, the lower portion set up against the beam and its bottom rested upon a bracket, where provision was made for bolting it also, but the bolting there was omitted until after the passage of the traveler over the girders. This was the method of going along with the

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work up to the time in question. There was evidence tending to prove that the bracing would have added materially to the stability of the girders, to the support of the traveler, and to the safety of the employes engaged upon it; and that such bracing is usual in like cases in other work; also that bolting the girders at the bottom as well as at the top would have essentially aided in keeping them in the position in which they were placed. The conclusion was warranted that the situation in which the girders were when the platform conveying the engine, boiler and other implements was moved over them, was such as to be deemed in defective condition for such use and purpose. Not because the girders had not of themselves adequate strength, but for the reason that they had not the support to keep them in proper position which they should have had, and which may have been given to them by such lateral bracing, and further support would have been given by bolting the ends at the bottom. But it seems that the onward movement of the traveler was not delayed for that purpose, nor sufficient time to straighten bent girders. Another force of workmen was supplied to follow the traveler, laterally brace them, and straighten such of the girders as were bent and complete the bolting of them at the ends. This plan and system of proceeding with the work of construction may have been adopted and employed quite as much in reference to expedition as safety. The movement of the platform on twelve wheels, each two feet in diameter, was slow and regulated, when necessary, by a rear or heel rope used to restrain its movement down grade and to aid in stopping its progress. And the steadiness of its movement very likely was supposed would give safety to it. But in view of the fact that it may have been rendered more so, and perhaps perfectly safe, by taking little more time to brace and bolt the girders before attempting to pass the platform over them, permitted the conclusion that failure to do so was negligence on the part of the defendants in the method adopted to proceed with the work. There was some, but not very satisfactory, evidence that the heel rope, as it was called, in the rear was defective, and on the occasion in

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question was broken. On the part of the plaintiff, evidence was also given tending to prove that the rope or cable to which the power was applied to draw the traveler over the girders was not in line with its motion or movement, that the clamp employed, not being such as could be fastened to the cross-beam in direct line from the place it was attached for that purpose to the moving platform, was fastened a distance in advance of it to one of the longitudinal girders. This was the subject of considerable evidence, and it is by no means clear that the divergence of this rope from the direct line of motion was such as to be seriously prejudicial to the safe movement of the structure, although the evidence may have presented a question in that respect for the jury in connection with the condition in which the girders were when required to support the transmission of the platform over them. But the main question seems to have had relation to the defective manner in which the girders were stayed to their places.

It is, however, urged by the defendants' counsel that although they may not have been as firmly supported as they should have been, the plaintiff, having been engaged on the work for considerable time, knew the situation of the girders, that they were neither braced nor bolted at their ends to the brackets on the cross-beams, and assumed such hazards as were incident to the operation of the platform on which he was engaged in the service. It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. (*Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *DeForest v. Jewett*, 85 id. 264; *Sweeney v. Berlin, etc., Envelope Co.*, 101 id. 520; *Hickey v. Taaffe*, 105 id. 26; *Williams v. D., L. & W. R. R. Co.*, 116 id. 628.) Those not obvious assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of struc-

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tures and appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. (*Kain v. Smith*, 89 N. Y. 375; *McGovern v. C. V. R. R. Co.*, 123 id. 280.)

It was plain to be seen that there was no lateral bracing between the girders. This the plaintiff knew. He may also have observed that the ends were bolted only at the top. As they were resting upon the cross-beams, it may be that no apprehension of danger in the passage of this loaded platform over them was apparent to ordinary observation. And the importance of such bracing and bolting for the purpose of safely taking and moving that weight upon them by the means applied and in the manner it was, may have required some skill or judgment not available to an ordinary observer, or to the plaintiff. The knowledge of what appeared to him to be the situation may not necessarily have advised the plaintiff of the consequences which might result from it. The place of the plaintiff's service was on the platform where was located the power applied to raise the girders, and when that was being done, it was sixty feet or more in the rear from the place where the girders, as they were hoisted, were placed and bolted. The inference was permitted from the evidence that the defective condition occasioned by the want of bracing and bolting for the purposes of bearing the moving weight upon the girders, and the consequences to be apprehended from such omission, so far as they were attributable to such causes, were not within the hazards of the service assumed by the plaintiff, nor was he, as matter of law, chargeable with contributory negligence, and, therefore, the motion for nonsuit was properly denied.

For the purpose of proving the character and extent of the injury the plaintiff had sustained, a medical witness was called and testified that, the Saturday before the trial commenced (which was more than a year after the accident), the plaintiff came to his house and submitted himself to the examination of

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the witness. After testifying that he formed an opinion that the plaintiff was suffering from an injury to the spinal cord from some cause, the doctor was asked: "What are the symptoms of that injury, and what does that injury do in case of disabling him?" And answered: "There is inability to walk; inability to stand, even. There is want of sensation in the lower extremities; there is marked tenderness over a portion of the spine; there is a loss of sexual power. Of course, my opinion in that respect must rest upon his declarations, but if his statement be true, there is an entire loss of sexual power." The defendants objected to the witness stating what the plaintiff said to him, and on the doctor proceeding to state something further that the plaintiff had said, the defendant's counsel moved that it be stricken out. The court, in denying the motion, remarked that the evidence was taken with the understanding that it would be stricken out unless the fact should be proved by him. The defendant's counsel excepted. The witness further testified that he asked the plaintiff about his power of sexual intercourse. The doctor was then asked the following question, objection to which was overruled and exception taken: "Q. What question did you ask him, and what reply did he make, concerning sexual intercourse? A. I asked him whether or not he had sexual intercourse, and he said he had not; I said to him, have you had since the injury? A. Never. I said to him, have you had any intercourse with your wife since then? He said, I have never been able to." And the witness gave some further evidence of the declaration of the plaintiff on the subject of his sexual disability during that time. In overruling the objection, the court said that he would receive the evidence under the "same ruling and limitations" already indicated. The question arises whether or not the reception of this evidence was error. As a general rule, declarations made out of court by a party are not admissible as evidence in his behalf. But his statements to his attending physician of the nature of the symptoms of his malady or suffering have quite uniformly been held admissible, and from necessity they were formerly deemed competent when made

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to persons other than medical attendants under some circumstances. (*Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 id. 344; *Matteson v. N. Y. C. R. R. Co.*, 35 id. 491.) But since the Code permits parties to make their statements under oath as witnesses, that necessity in this state has ceased to exist, and as a rule declarations made to persons other than the medical attendant of the party, are not admissible as evidence. (*Reed v. N. Y. C. R. R. Co.*, 45 N. Y. 574; *Roche v. Brooklyn City, etc., R. R. Co.*, 105 id. 294.)

It was, however, held in *Hagenlocher v. C. I. & B. R. R. Co.* (99 N. Y. 136), that the evidence of a non-medical witness that the plaintiff (who had received an injury) manifested pain by screaming, was held competent because it was apparently involuntary and corroborated by what appeared to be her condition. The rule of admissibility of statements made to physicians by persons who have been physically injured, or are suffering from disease, is not an unqualified one. They must relate to present and not past pain and suffering. (*Towle v. Blake*, 48 N. H. 92.) And it has been held that their declarations, after controversy had arisen, made at a medical examination then had for the purpose of preparing evidence, and not for medical treatment, were incompetent. (*Grand Rapids & Ind. R. R. Co. v. Huntley*, 38 Mich. 537; *Jones v. Prest., etc., of Portland*, 50 N. W. R. 731.) In *Matteson v. N. Y. C. R. R. Co.* (35 N. Y. 487), it was held that expressions of pain and suffering made by the injured person to physicians when they were examining him were competent evidence notwithstanding the examination was made by them with a view to testifying as to the result of it in a suit then pending. The same was said in *Kent v. Town of Lincoln* (32 Vt. 591). It may be seen that when attended by a physician for the purpose of treatment there is a strong inducement for the patient to speak truly of his pains and sufferings while it may be otherwise when medically examined for the purpose of creating evidence in his own behalf. It is, therefore, that the weight of judicial authority is to the effect that the statements expressive of their present condition are permitted to be given

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as evidence only when made to a physician for the purposes of treatment by him. (*Barber v. Merriam*, 11 Allen, 322; *Fay v. Harlan*, 128 Mass. 244; *Roche v. Brooklyn City, etc., R. R. Co.*, 105 N. Y. 294.)

In the present case the declarations in question of the plaintiff were not instinctive nor were they made to the physician with a view to medical treatment. They consisted not of exclamation of present pain or suffering, but were the plaintiff's statements so far as called for by the doctor of the effect upon him of the injury and the consequences which had followed in such respects from the time it occurred, a period of nearly fifteen months. This was hearsay, and is very different from that of a medical witness as to the expressions by a patient or person suffering from injury or disease, indicating pain or distress or expressive of the present state of his feelings in that respect. We think the reception of the evidence was error. And although the plaintiff testified to the truth of the statements made to the doctor his evidence did not cure the error. The character of his injury was an important fact as bearing upon the question of damages. And although his evidence may have constituted the basis in part at least of a hypothetical question for the opinion of the doctor it cannot be said that the evidence given by the latter of the plaintiff's declarations were not prejudicial to the defendants. The plaintiff's interest as a party presented the question of his credibility for the jury, and his evidence could not properly be corroborated by proving that the facts to which he testified corresponded with the declarations made by him to the doctor. This for the support to the plaintiff's evidence was not admissible. (*Robb v. Hackley*, 23 Wend. 50; *Reed v. N. Y. C. R. R. Co.*, 45 N. Y. 574.)

The other exceptions taken require no consideration as they may not necessarily arise upon another trial.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

DAVID H. JAMES, Appellant, v. ISAAC SAMMIS et al.,
Respondents.

182 289
75 AD*818

In an action for alleged trespass in entering upon plaintiff's land in the town of Huntington, and taking down his fence, the defense was that the *locus in quo* was part of a public highway which bounded plaintiff's premises on the south, upon which the fence encroached and that it was removed by order of the highway commissioners. It appeared that in 1869, the fence on the south side of the highway which had been located there for over forty years was moved south, which constituted the alleged encroachment claimed by the defendants. With a view to proceedings for removal of the fence under the provisions of the Revised Statutes (1 R. S. 501-526, §§ 100-103, as amended by chap. 245, Laws of 1873), which declares that all roads not recorded which have been used as public highways for twenty years, shall be considered such, and authorizes proceedings for removal of encroachments, the commissioners of highways of the town in 1885, made an order purporting to define and describe the highway, which with a map*thereof, was made of record in the town. In 1886, the commissioners made an order describing the alleged encroachment, and directing the removal of the fence. This order with a notice annexed was served upon plaintiff, and after sixty days, under direction of the commissioners, the fence was removed by defendants. It was claimed by plaintiffs that said statutory provisions were not effectual to support the proceedings, because prior to 1864, they had no application to the town, it being governed by special acts (Chap. 14, Laws of 1789; chap. 56, Laws of 1830). These acts were repealed by the act of 1864 (Chap 514, Laws of 1864), and by the act of 1865 (Chap. 6, Laws of 1865) the general statutes were extended to the counties named in said special acts. *Held*, that as at the time of the encroachment and of said order, the road had been used as a public highway for twenty years, it was within and subject to said provisions of the Revised Statutes, that the amendment in 1878, in reference to the removal of encroachments, merely gave an additional remedy, which was available although it did not exist at the time of encroachment.

Also *held*, that prior to said statutes of 1864 and 1865, the provisions of the Revised Statutes, as they then were, were effectual in the counties named in the special acts, as they were not in conflict but were consistent with them, and for purposes for which no provision was made in the local statutes.

Defendants introduced in evidence a paper found among the old records of the town, purporting to be an order made in 1746, by the town commissioners "in pursuance of an order of General Assembly," which described the highway in question. *Held*, that the order was properly

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received in evidence and that it was within the statutory power of the commissioners to make it. (Chap. 575, Col. Laws 1792; chap. 686, Col. Laws 1799.)

It was claimed that the notice served by the commissioners upon plaintiff was defective in that it did not specify the breadth of the road originally intended as required by the statute (1 R. S. 526, § 103, as amended by chap. 245, Laws of 1878). *Held*, untenable; that the order contained it, and as this was annexed to and served with the notice, they practically constituted a single document and this was sufficient; that it was not essential that the specification should appear in both notice and order.

(Argued February 4, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles R. Street for appellant. Where a person using a laid out highway occasionally passes over the land adjoining it, that is not such a use as would make the adjoining land a highway. (*Rozell v. Andrews*, 103 N. Y. 150.) There is no evidence in the case sufficient to establish that the premises in question had become a highway by user. (Laws of 1789, chap. 14; Laws of 1830, chap. 56; *People v. Quigg*, 59 N. Y. 83.) The act of 1864 repealing the Long Island Counties Act and extending the provisions of the general statutes relating to highways in Suffolk county, had no retroactive effect. (*Williams v. Oswego*, 25 Hun, 38; *Carpenter v. Skinner*, 24 id. 466; *McCahill v. Hamilton*, 20 id. 391; *Dash v. Van Kleeck*, 7 Johns. 477; *Sayre v. Wisner*, 8 Wend. 661; *Wood v. Oakley*, 11 Paige, 400; *Johnson v. Burrill*, 2 Hill, 238; *Sanford v. Bennett*, 24 N. Y. 20; *Amnsbry v. Hinds*, 48 id. 60.) Assuming, for the sake of argument, that the defendants had in some manner shown that the premises in question had become a highway by user at the time of the erection of the fence in 1869, even then the

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encroachment proceedings, on which the defendants rely and upon which and their regularity the judgment is based, were unauthorized. (*Talmadge v. Hunting*, 29 N. Y. 447; *People v. Judges, etc.*, 24 Wend. 491; *Davenport v. Lambert*, 44 id. 598; *Cook v. Cavit*, 18 Hun, 289; *Benton v. Wickwire*, 54 N. Y. 226.) Assuming again that the premises in question were a part of the highway, the order of encroachment and notice to remove the same, which were served on the plaintiff, were so defective as to afford no protection to the defendants in the destruction of the plaintiff's fence. (*Cook v. Cavit*, 18 Hun, 288; *Mott v. Rush*, 2 Hill, 472; *Spicer v. Slude*, 9 Johns. 359; *Rozell v. Andrews*, 108 N. Y. 150.)

Henry C. Platt for respondents. When the General Term has affirmed findings of fact and there is, in any view, evidence to sustain them, the Court of Appeals will not review them. (*Berdell v. Allen*, 116 N. Y. 661; *Rutherford v. Schattman*, 119 id. 604; *Healy v. Clark*, 120 id. 642.) There was a user of this highway, including the portion thereof in controversy, by the public, from the time whereof the memory of man runneth not to the contrary, up to 1869, when the obstruction or encroachment was made by the building of a new fence out into the said highway. (*Sage v. Barnes*, 9 Johns. 365.) A highway legally laid out, its continuance as such is to be presumed, unless the proof shows to the contrary. (*Beckwith v. Whelan*, 65 N. Y. 322; Laws of 1878, chap. 245, § 1.) The exception taken by the plaintiff to the exclusion by the referee of an alleged conversation with one of the three commissioners of highways is of no avail. (*People v. Hynds*, 30 N. Y. 470; *Stewart v. Wallis*, 30 Barb. 344; 1 R. S. 525, § 125; *Fitch v. Comrs.*, 22 Wend. 132.) Accretions at the end of a highway that runs to the shore and in the line thereof become and remain a part of the highway, and the highway still goes on the same line to the shore, wherever the shore may be. (*Wetmore v. A. W. L. Co.*, 37 Barb. 70-97; *People v. Lambier*, 5 Den. 9; Angel on Tide Waters, 64, 218.) The provisions of the Long Island Counties Act of 1789-1830 as to highways,

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which existed prior to 1865, have no bearing upon this case. (Laws of 1865, chap. 6; *Key v. Goodwin*, 4 M. & P. 341; Sedg. on Stat. Const. 109, 110; *Tivey v. People*, 8 Mich. 128; Dwarris on Stat. 676.) Highways by user have always been recognized as legal public highways under the common law and statutes of this state. (*Driggs v. Philips*, 103 N. Y. 77; *Hickok v. Village of Plattsburg*, 41 Barb. 130; *Bridges v. Wyckoff*, 67 N. Y. 130.) The commissioners had the right to remove the fence by proceedings under chapter 245, Laws of 1878, sections 1, 103. (*People v. Hunting*, 39 Hun, 455; Laws of 1878, chap. 245, §§ 1, 103, 104; *Baylis v. Roe*, 5 N. Y. Supp. 279; *Wetmore v. Tracy*, 14 Wend. 250; *Cooper v. Bean*, 5 Lans. 318; *Chapman v. Gates*, 54 N. Y. 132; Cook on Highways, 309, 310; *Cook v. Harris*, 61 N. Y. 448-455; *Driggs v. Phillips*, 103 N. Y. 77; *Bridges v. Wyckoff*, 67 id. 130; *L. T. Co. v. Rogers*, 2 Barr, 114; *Rung v. Shoneberger*, 2 Watts, 23; *Dimmett v. Eskridge*, 6 Munf. 308; *Gunter v. Geary*, 1 Cal. 462; *Davis v. Mayor, etc.*, 14 N. Y. 524.) Every actual encroachment upon a highway by the erection of a fence or building thereon, or any other permanent or habitual obstruction thereof, may fairly be said to be a nuisance, even though it does not operate as an actual obstruction of public travel. (Wood on Nuisances [Ed. 1883], 260; *Harlow v. Hutchinson*, 6 Cow. 189; *Gregory v. Commonwealth*, 2 Dana, 417; *Stetson v. Faxon*, 19 Pick. 147; *Barker v. Com.*, 19 Penn. St. 412; *Rex v. Wright*, 3 B. & Ad. 681; Add. on Torts, 225; *L. T. Co. v. Rogers*, 2 Penn. St. 114; *Wetmore v. Tracy*, 14 Wend. 250; *Dickey v. M. T. Co.*, 46 Me. 483; *Harrower v. Retson*, 37 Barb. 301; *Wright v. Saunders*, 65 id. 214; *Radcliff v. Mayor*, 4 N. Y. 195; *Gozzler v. Georgetown*, 6 Wheat. 593; *Cullender v. Marsh*, 1 Pick. 418; *Snyder v. Rockport*, 6 Ind. 237; *McFadden v. Kingsbury*, 11 Wend. 667; *Andersen v. Van Tassel*, 53 N. Y. 631; *Cook v. Harris*, 61 id. 448; *Driggs v. Phillips*, 103 id. 77; *Perley v. Hilton*, 55 N. H. 444; *Kerr v. Hammer*, 15 N. Y. Supp. 605; *Morton v. Moore*, 15 Gray, 573.)

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N. S. Ackerly for respondent Smith. The highway in question was a public highway. (*Driggs v. Phillips*, 103 N. Y. 77; Laws of 1864, chap. 514; *Davenpeck v. Lambert*, 44 Barb. 596; *Porter v. Village of Attica*, 33 Hun, 605; *Snyder v. Plass*, 28 N. Y. 475; *Hickok v. Trustees, etc.*, 41 Barb. 120; *Galatin v. Gardiner*, 7 Johns. 107; *Bridges v. Wyckoff*, 67 N. Y. 130.) The proceedings of the commissioners of highways entering and describing this road of record, and defining the encroachment and the steps taken to cause removal of fence, were regular. (*Spicer v. Slade*, 9 Johns. 359; *Mott v. Rush*, 2 Hill, 473; *Cook v. Covil*, 18 Hun, 288; *Snyder v. Plass*, 28 N. Y. 475.) Independent of any proceeding ascertaining and describing this road of record and subsequent order defining encroachment, etc., the commissioners of highways had the right to remove this fence if this was a legal highway, either by virtue of the laying out in 1746 and statutes confirmatory thereof, or if the road became a public highway by user. (*Beckwith v. Whalen*, 65 N. Y. 322.) The commissioners of highways stopped their description of the road at original high-water mark. If they establish the highway to that point, then, as a matter of law, the same will extend over accretions to the present high-water mark. (*People v. Lambert*, 6 Den. 9; *Fowler v. Mott*, 19 Barb. 204.)

W. B. Codling for defendant Kirby and others. As to the defendants Selah Hall and Joseph Conkling, the referee found that they took no part in the alleged trespass; this finding as to them is sustained by the evidence. (*T. & R. R. Co. v. Kerr*, 17 Barb. 581; *Goodyear v. DeLa Vergne*, 10 Hun, 537; *Rous v. Whited*, 25 N. Y. 170; *Albro v. Figura*, 60 id. 630; *Vanderbilt v. Schreyer*, 21 Hun, 537.)

BRADLEY, J. The cause of action alleged is trespass upon the plaintiff's land, in the town of Huntington, county of Suffolk, by entering upon it, taking down his fence and doing other injury to the premises. The defendants deny the alleged wrongful entry, and by way of justification, allege that the

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locus in quo was a public highway, and that what they did there was done in pursuance to lawful authority in removal of encroachments upon or obstructions within such highway. Whether that defense was sustained by the evidence is the main question requiring consideration. The plaintiff's premises are bounded on the south by the highway, and its northern boundary is the subject of controversy. The earliest evidence on the subject of a highway in that locality was represented by an order of three commissioners, purporting to have been made May 26, 1746, in pursuance of an act of general assembly, in which it is stated that they, "commissioners chosen for the town of Huntington," laid out "one highway two rods wide between the lands of Thomas Bunce and Edward Baylis on the north side, and Alexander Bryan, Jr., on the south side, beginning near the said Baylis' ship yard, bounded by a white oak saplin or stump on the north, and on ye south side of the highway by a maple saplin, so running easterly to Neck Path." It appears that the location so described is substantially that of the highway in question, but the boundary lines of it as there represented, could not be definitely established by evidence, as the oak and maple saplings did not, within the memory of any of the witnesses, remain to mark the outer lines so described of the road. By several deeds of conveyance of the lands on either side of the highway from a time as early as 1816, it is referred to as a boundary. And evidence of witnesses relating to the situation for a period of sixty years before the time of the alleged trespass, tended to prove the location of fences on either side of the highway, and, in reference to them, of certain trees which were referred to for the purpose of identifying the location of the fences prior to 1869, when that on the north side of the highway was moved south. The fence in the location to which it was changed constituted the alleged encroachment upon the highway or obstruction in it. And with a view to proceedings to cause its removal, the commissioners of highways of the town of Huntington, on September 7, 1885, made an order which purported to define and describe the highway. This order,

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with a map of the highway so described, was made of record in the town. And on March 29, 1886, the commissioners made a further order describing the encroachment of the fence so moved, etc., and directing its removal. This order annexed to a notice addressed to him was served upon the plaintiff, and after the expiration of sixty days the commissioners directed the overseer of that road district to remove the fence. It was done pursuant to such instruction under the direction of the overseer. The referee found that the place where this fence was situated was part of a public highway, which had been used as such continuously for at least forty years prior and up to the time when the fence was erected in 1869. This finding the plaintiff challenged by exception, as he also did the conclusion that the removal of the fence by the defendants was justified. The order of May 26, 1746, was found among the old records of the town in the proper official custody, and was apparently authenticated by the clerk's indorsement upon it. And there was no error in its reception in evidence, assuming it was within the statutory powers of the commissioners to make such an order. It seems to have been so. (Col. Laws, 1732, ch. 575; Id. 1739, ch. 686.) And so far as they remained in force the colonial statutes were adopted and treated as effectual in this state until altered by the legislature. (Const. 1777, art. 35.) The order recited that it was made "in pursuance of an act of general assembly." It is deemed unnecessary to determine whether, in view of the early period at which the order was made and the subsequent use of the highway, it had the support of presumption that it was duly made, as the question of its reception in evidence was one of order of proof, and no motion founded upon a want of preliminary proceedings was made to strike it out.

The proceedings taken by the commissioners to ascertain and define the boundaries of the highway, were not had in reference to that order of 1746, as it seems, or may be inferred that they were not then advised of its existence. But as appears by the recital in their order, they treated the highway as such by user from 1828, and evidently proceeded in view

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of the statute, which provides that all roads not recorded, which have been used as public highways for twenty years or more, shall be deemed public highways (1 R. S. 521, § 100), and that proceedings may be taken for removal of encroachments and obstructions. (Id. § 103, as amended by L. 1878, ch. 245.)

It is urged on the part of the plaintiff that those statutes were not effectual to support the proceedings taken by the commissioners, because prior to 1864 they had no application to the county of Suffolk, which with the counties of Kings and Queens was, in that respect, governed by statutes specially applicable to them (L. 1789, ch. 14; L. 1830, ch. 56), and that it did not appear that the place where the fence was located was any part of a public highway when it was erected there in 1869, as the provisions of the latter act (1830) for entering of record highways created by user, included those only which had been used as such for twenty years or more next preceding the 21st day of March, 1797, and which had been worked and used as such constantly for the last six years. If the fence was not then in a public highway the defendants were trespassers, and as such liable to the plaintiff. And such result would necessarily follow if the use of the *locus in quo* as part of a public highway for twenty years next preceding March 21, 1797, was essential to the defense, as there is no evidence to that effect.

But it may be observed that by L. 1864, ch. 514, the statutes before mentioned specially and exclusively applicable to those Long Island counties, were repealed, as were also laws on the subject applicable only to the counties of Suffolk and Queens, and by L. 1865, ch. 6, the general statutes of the state were extended to those counties. The fence charged to be an encroachment and obstruction in the highway had not yet been erected. And as the road had then been used as a public highway for twenty years, it came within and was subject to the provisions of the statute before mentioned (1 R. S. 521, § 100), and was within the force of the statute which made it the duty of the commissioners to cause such of the highways

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"as shall have been used for twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office." (1 R. S. 501, § 1.)

The act of 1830 before referred to did not, in effect, provide that public highways would not be created by twenty years' user as such, but merely limited as there mentioned, the duty of the commissioners to cause them to be entered of record.

The general act of 1813 went further and provided that when roads had been used for twenty years or more next preceding the 21st day of March, 1797, they should be taken and deemed as public highways, although no record of them had been made, and charged the commissioners with the duty of opening to the width of two rods or more all roads which had been so used at that time. (2 R. L. 277, § 24.) And until further legislation on the subject the statutory highway by user was only that which had been used as such for twenty years prior to March 21, 1797. (*Galatian v. Gardner*, 7 John. 106; *People v. Lawson*, 17 id. 277.) This remained so until 1817, when it was provided "that when any roads have been used as public highways for twenty years or more, the same shall be taken and deemed as public highways, although no record thereof has been made" (L. 1817, ch. 43, § 3), and this was substantially taken into the Revised Statutes, and has since remained in force. This statutory declaration probably was for its support founded upon the common-law doctrine of dedication to the public by presumption (thus made conclusive) arising from acquiescence on the part of the owner in the use of a road as a thoroughfare for twenty years, a period analogous to that of the limitation applicable to incorporeal rights as between persons. (3 Kent's Com. 451; *Gould v. Glass*, 19 Barb. 179.)

Since the amendment in 1878 of the Revised Statutes relating to proceedings to remove encroachments has made them applicable to public highways, which have become such by user, there is no objection to the making use of them in the present case unless, as claimed by him, some vested right existed in the plaintiff to defeat the application of those pro-

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ceedings at the time they were taken. That contention cannot be supported if the place where the fence was located was a public highway at the time it was erected there in 1869. This statutory remedy is merely an additional one, in the cases to which it was extended, for the protection of highways to the public use, and in which the adjacent owner had and could by his wrongful act take no vested right as against the public to defeat the remedy, although such particular remedy did not exist at the time he sought to interfere with the public use of some portion of the highway by encroachment and appropriation to his own use.

We have proceeded upon the assumption that the only statutes applicable to the highways in the county of Suffolk prior to 1864-5 were those only which related exclusively to those Long Island counties. But, although, if that were so, it would not, in the view taken, essentially affect any question in the present case, we think that such was not the situation. It is true, as a rule, that laws, special and local, are not deemed repealed by general statutes upon the subject without clear manifestation in some manner of such legislative intent. (*People v. Quigg*, 59 N. Y. 83.) And it may be assumed that the provisions of the statutes relating specially to those counties were not superseded by any general legislation, but general statutes consistent with them for purposes for which no provision was made by the local statutes upon the subject of highways, may have been effectual there as well as elsewhere in the state. The provision of the act of 1817 before mentioned, and which became part of the Revised Statutes, declaring the creation of public highways by user, was general and was applicable to the entire state, subject to special and local statutes with which such provision would not be in harmony. It provided for no proceeding, but simply declared that roads which have been or shall have been used as such for twenty years or more shall be deemed public highways. Our attention is called to no statute or statutory system relating exclusively to those counties upon the subject, by which any reason is furnished why that provision of the Revised Statutes

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was not applicable alike to them and other portions of the state prior to as well as since 1865. It is clear that prior to 1869, there was a public highway bounded north by the land of which the plaintiff afterwards became the owner, and that it has continued to be such highway.

The remaining questions are whether the fence was within it, and whether the proceedings taken and had to remove the encroachment were legally effectual for the purpose. There was evidence tending to prove that the road as represented by the location of fences on either side, and used for more than twenty years prior to 1869, was at least two rods wide; and the highway, as described by the survey contained in the order of the commissioners of highways and represented by the accompanying map, was of the width of two rods. There was also evidence tending to prove that the northern boundary of the highway was no farther south than that described by such survey. This evidence related to a period of upwards of forty years next preceding 1869, and was sufficient to present a question of fact, and to warrant the conclusion of the referee that the fence was within the highway, and the encroachment such as was described by the survey and represented by the order.

It follows that the facts were such as to permit the successful application of proceedings for the removal of the encroachment. In conducting them, it was essential to their validity that the statute be strictly pursued.

It is insisted by the plaintiff that there was a failure on the part of the commissioners to do so. The order, as well as the notice to which it was annexed, for the removal of the encroachment was addressed to the plaintiff. The statute provides that "every such order and notice shall specify the breadth of the road originally intended, the extent of the obstruction or encroachment, and the place and places where the same shall be." (1 R. S. 526, § 103, as amended by L. 1878, ch. 245.) It is urged that the order served did not sufficiently or correctly describe the extent of the encroachment. At one point in the description of it there was an apparent clerical error in

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representing the encroachment in the order, but it is not seen how this could have had the effect to mislead the plaintiff, and by reference to the order and the map therein referred to, it seems quite clearly that it could not.

It is also urged that the notice was defective in that it did not specify the breadth of the road originally intended, the extent and places of encroachments. The specification in the order of the breadth originally intended was somewhat informal, but was sufficiently made there. The construction contended for is that it is not sufficient to have the specification in the order, but its repetition in the notice was essential. The cases cited upon that subject do not to that extent support the proposition. The order containing the specification was annexed to the notice and referred to by it. Both were upon the same paper, and practically constituted a single document. This, we think, was a compliance with the provision of the statute requiring the specification in the order and notice. These views render it unnecessary to proceed to the consideration of the powers of the commissioners, incident to their general care and superintendence of the highways, to remove obstructions in them irrespective of any statutory proceeding, in their application to the present case.

The judgment should be affirmed.

All concur.

Judgment affirmed.

132	250
138	572

132	250
158	612

132	250
78	AD*619

THE CHEMICAL NATIONAL BANK of New York, Respondent,
v. AUGUSTUS W. COLWELL, Impleaded, etc., Appellant.

Under the provision of the act of 1875 (§ 10, chap. 611, Laws of 1875), providing for the incorporation of certain business corporations, which requires that the directors of a corporation organized under it shall, at their election, "and throughout their term of office," be stockholders, whenever, and as soon as, a director parts with all beneficial interest in and control over his stock and causes the officers of the corporation to have knowledge of such fact, by request that a proper transfer be made on the corporate books, the statute operates to divest him of his office, and he ceases to be a director. (BRADLEY, J., dissenting.)

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The provision of said act, declaring that no transfer of stock "shall be valid for any purpose whatever," except to render the transferee liable for debts, until it shall have been entered in the stock transfer-book required to be kept by the company, is only for its protection and does not operate to prevent the passing of the entire legal and equitable title in the shares, as between the parties, by the delivery of the certificate with assignment and power of transfer. (BRADLEY, J., dissenting.)

In an action against the alleged directors of such a corporation to recover a debt of the corporation because of failure to file an annual report in January, 1886, as required by the act (§ 18), it appeared that defendant C., in November 5, 1885, assigned and delivered his certificate of stock, which was for eighty shares, to J., the secretary of the company, for the purpose of terminating his connection with the company. J. accepted the assignment, C. asked for the transfer-book, but the company had no such book at that time, and he was told it was not necessary. A few days later, a transfer-book, having been obtained, the assignment was entered therein. J., however, issued a new certificate to himself for only seventy-five shares, and to C., without his knowledge, a certificate for five shares, which J. induced him to accept, but not with any understanding that he should be a director. The debt in question was incurred by the corporation in June, 1886. *Held* (BRADLEY, J., dissenting), that C. ceased to be a stockholder on his assignment of stock, and thereupon ceased to be a director, and so, was not liable.

(Argued February 10, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made February 10, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was brought against defendants as directors of the New York Lumber Auction Company (Limited) to recover an indebtedness of the company because of failure on their part to file an annual report.

The material facts are stated in the opinion.

Edward C. Perkins for appellant. The plaintiff failed to show that the note in suit was the note of the New York Lumber Auction Company. (Laws of 1875, chap. 611, § 6; *Brady v. Mayor, etc.*, 16 How. Pr. 443; *P. Bank v. S. A. Church*, 109 N. Y. 512, 521; *McCullough v. Moss*, 5 Den. 566, 575;

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Vail v. Hamilton, 85 N. Y. 453; *Henning v. U. S. Ins. Co.*, 47 Mo. 425; *S. Bank v. G. Bank*, 17 Mass. 1; *People v. Bank N. A.*, 75 N. Y. 547.) The note having been discounted by the plaintiff for the personal benefit of Jones, who was the secretary and treasurer and one of the directors of the company, and the bank having notice that Jones stood in this relation to the company, the burden of proof was upon it to show that the note was issued for the benefit of the company, and as such proof was not forthcoming, the plaintiff could not recover. (Story on Part. § 133; *Franklin v. McGusty*, 1 Knapp, 274, 301; *U. N. Bank v. Underhill*, 102 N. Y. 337, 339; *Gansevort v. Williams*, 4 Wend. 147; *Wilson v. M. R. Co.*, 6 N. Y. S. R. 234.) The note either had its inception before it was indorsed by Ludington or not until it was discounted by the plaintiff. If the former, then it was evidently issued to Jones, who was a trustee, and as Jones could not recover against this appellant because himself liable for the default in filing the report, the plaintiff, who bought with knowledge of Jones' trusteeship, cannot recover. If the latter, then the debt did not exist during Colwell's term of office, and for that reason the plaintiff must fail. (Laws of 1875, chap. 611, § 10; *Briggs v. Easterly*, 62 Barb. 61; *Bronson v. Dimock*, 4 Hun, 614, 615; *Knox v. Baldwin*, 80 N. Y. 610, 611; *Estes v. Burr*, 5 J. & S. 1; *McClave v. Thompson*, 36 Hun, 365; *Easterly v. Barber*, 65 N. Y. 255; *Van Amburg v. Baker*, 81 id. 46; *Deming v. Puleston*, 55 id. 655; *Reed v. Keese*, 60 id. 616; *Vincent v. Sunds*, 1 J. & S. 516; *Sanborn v. Lefferts*, 58 N. Y. 179; *Sturges v. Vanderbilt*, 73 id. 384; *P. & R. Co. v. Hotchkiss*, 82 id. 471.) The appellant's resignation on November 4, 1885, was effectual, and from that day he was no longer a director in the company. (*Squires v. Brown*, 22 How. Pr. 35; *Chandler v. Hoag*, 2 Hun, 613; *Briggs v. Spaulding*, 141 U. S. 152; *Bruce v. Platt*, 80 N. Y. 371; *C. Bank v. Kortwright*, 22 Wend. 348.) When Colwell surrendered his stock certificate with the transfer on the back indorsed by Jones, and it was accepted by Jones and canceled, he ceased *ipso facto* to

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be a director. (*Bruse v. Platt*, 80 N. Y. 379; *Bank of Utica v. Smalley*, 2 Cow. 770; *Isham v. Buckingham*, 49 N. Y. 216; *Robinson v. N. Bank*, 95 id. 637; *McNeil v. T. N. Bank*, 46 id. 331; *Cutting v. Damerel*, 88 id. 410; *Leitch v. Wells*, 48 id. 585; *Hoyt's Case*, L. R. [3 Eq.] 286; *Ward's Case*, L. R. [2 Eq.] 226; *Ex parte Henderson*, 19 Beav. 107; *Upton v. Burnham*, 3 Biss. 431, 520; *Thompson on Stockholders*, § 217; *Whitney v. Butler*, 118 U. S. 655.) Colwell, having once ceased to be a director, could not be reinstated merely by again becoming a stockholder. (*Blake v. Wheeler*, 18 Hun, 496.) In actions of this kind, which are to enforce a penalty, every intendment will be in favor of the defendant, everything must be affirmatively proved, the act will not be extended by construction to support the penalty, and the case made by the plaintiff will be severely scrutinized. (*Garrison v. Howe*, 17 N. Y. 458; *Miller v. White*, 50 id. 137; *W. A. Co. v. Barlow*, 63 id. 62.)

Charles Jones for respondent. The exception of the defendant to the reading of the note in evidence was not well taken, and his motion to dismiss the complaint was properly denied. (*Kindberg v. Mudgett*, 114 N. Y. 625.) The main defense to the action on which the defendant relied, namely, that he resigned the office of director of the company in November, 1885, is wholly unsupported by the proof. (*Squires v. Brown*, 22 How. Pr. 35; *Chandler v. Hoag*, 2 Hun, 613; *Blake v. Wheeler*, 18 id. 407; *Kindberg v. Mudgett*, 114 N. Y. 625; *Adderly v. Storm*, 6 Hill, 624; *Worrell v. Johnson*, 5 Barb. 210; *Roosevelt v. Brown*, 11 N. Y. 148.)

PARKER, J. The debt which lies at the foundation of the judgment under review is alleged by the plaintiff to have been incurred by the "New York Lumber Auction Company (Limited)," a corporation organized pursuant to chapter 611 of the Laws of 1875. The corporation has no money with which to pay the obligation, and the assertion of defendant's liability to respond therefor is based on the default of the corporation in making the annual report required by statute.

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The defendant's denial of liability is placed on three grounds:

1. That the note having been made by the corporation payable to its own order, the plaintiff by discounting it for the personal benefit of Jones, a director and secretary and treasurer of the company, became burdened with the necessity of proving that the note was issued for the benefit of the corporation making it, which it failed to do.

2. That the defendant resigned as director November 5, 1885, and before the arrival of the time for making the annual report in respect to which default was made.

3. That before the time came to make the report the defendant had ceased to be a stockholder, and, therefore, by operation of the statute, had ceased to be a director.

As we have reached the conclusion that the last position is well taken and calls for a reversal of the judgment, the other questions will not be considered.

The corporation was created in July, 1885; the annual report omitted should have been made within twenty days after the 1st day of January, 1886, and the note in suit bears date July 2, 1886. The defendant was one of the subscribers to the capital stock of the company, and was elected a director. Subsequently he informed Jones, the secretary and treasurer of the corporation, that he wished to resign all connection with the company, assigning as a reason the duties imposed by the executorship of his father's estate.

After several conversations of the same general character, and on November 5, 1885, he, accompanied by his co-executor, Mr. Milne, went to the office of the company, and met Jones, the secretary and treasurer, and a Mr. Atchison, an employe. The defendant asked for his stock and received a certificate for eighty shares, which he indorsed as follows:

"For value received, I hereby sell, transfer and assign to Latimer E. Jones, eighty shares of stock within mentioned, and authorize L. E. Jones to make the necessary transfer on the books of the company.

"Witness my hand and seal this 5th day of November, 1885.

"In presence of

A. W. COLWELL.

T. S. ATCHISON."

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After executing this assignment he gave the stock certificates to Jones, at the same time saying: "Now, Jones, that severs all my connection with the Lumber Auction Company; I have got nothing further to do with it; you have got father's stock, he is dead, and that settles that, and I have given you nine, and that clears up all that, and I have nothing further to do with the company."

Jones accepted the stock and the defendant asked for the transfer-book, but the company did not have one, and he was told that it was not necessary. Some days later a transfer-book was obtained and the stock transferred, but as Jones, at the suggestion of Atchison, issued a new certificate to himself for seventy-five shares, and to the defendant, but without his knowledge, for the remaining five shares, and a few days later induced him to accept it, but not with the understanding that he should be a director, we are led to inquire whether the defendant did not cease to be a stockholder on the fifth of November?

The importance of that inquiry rests in the requirement of the statute that the directors "at their election, and throughout their term of office shall be stockholders in such corporation, to at least the extent of five shares." If then defendant ceased to be a stockholder in the corporation on November fifth, the statute put an end to his official relation with the company. It should be observed that on the occasion of the assignment of the stock to Jones and his acceptance thereof, it was understood to be an absolute disposition of all the defendant's shares. The subsequent issue of five shares to him was not in pursuance of any understanding had at the time of such assignment and was done at the instance of Atchison, who made out the certificate and suggested to Jones that he persuade Colwell to accept it.

The consideration of the undisputed testimony to which we have referred is not embarrassed by any question as to the good faith of the defendant or the propriety of his action. The corporation was solvent when he sought to terminate his relation with it as a stockholder and director, and the indebted-

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ness which induces this controversy was created months afterwards. That he intended to make an effectual transfer of his stock is not questioned; nor is it asserted that he omitted to do anything which the situation permitted to effectuate his purpose. The contention is that he did not accomplish his desire because the transfer was not made on the books of the company that day.

He sought to have that done, but it was not, because the company had failed to provide books for the purpose, as provided by its by-laws. It has been frequently held that such provisions are intended solely for the protection of the corporation; can be waived or asserted at its pleasure; are without effect, except for the protection of the corporation, and do not operate to prevent the passing of the entire title, legal and equitable, in the shares, as between the parties, by the delivery of the certificate, with assignment and power of transfer. (*Isham v. Buckingham*, 49 N. Y. 216; *Robinson v. National Bank of New Berne*, 95 id. 637; *McNeil v. Tenth National Bank*, 46 id. 331; *Leitch v. Wells*, 48 id. 585.)

The plaintiff's contention then is reduced to the position that notwithstanding the defendant parted with all title, both legal and equitable, in the shares, he still continued to be a stockholder within the meaning of the statute, because through the neglect of the corporation in providing proper transfer-books, the stock was not formally transferred on its books.

We do not think the statute should receive such a construction. The requirement that a director should have, at his election, and throughout his term of office, at least five shares, manifests that it was the policy of the legislature that the management of the affairs of such corporations should only be committed to those having a personal pecuniary interest in its success or failure, in the conduct of business for which it was created; otherwise the provision is without reason for its support.

It would seem to follow that as soon as a director parts with all beneficial interest in, and control over, the stock which he is required to hold, and causes the officers of the corporation

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to have knowledge of such fact by a request that a proper transfer be made on the books of the company, he no longer possesses the qualifications which the statute declares to be essential.

If the defendant had not been elected a director at the first election, and had simply subscribed for eighty shares of stock, it would hardly be contended that after making the disposition of it, which he did on November fifth, that he would have been eligible to the position of director; nor would there have been any excuse for assuming that he was, for even the books of the company did not show an apparent eligibility; there were no transfer-books, and the only evidence there was on that subject, in the possession of the company, showed that the defendant had parted with all interest in and dominion over the stock for which he had subscribed.

For the same reason, the statute executing itself operated to divest him of title to the office which he had ceased to be qualified to hold.

In the cases cited by the respondent, the question presented for our determination was neither before the court nor decided, and as they have received consideration by this court in *Cutting v. Damerel* (88 N. Y. 410), they need not be further alluded to in this connection.

The judgment should be reversed.

BRADLEY, J. (dissenting). I do not see my way to concurrence in reversal of the judgment.

The purpose of the defendant to resign his position of director of the N. Y. Lumber Auction Co. (Limited), was not brought to the attention of the board of directors. And his statement made to that effect to Jones, who was the secretary-treasurer of the company, does not seem effectual to accomplish it.

The statute under which the company was incorporated provides that the members of the board of directors at their election, and throughout their term of office, shall be stockholders in such corporation to at least five shares and shall

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hold their offices until their *successors* are chosen. (L. 1875, ch. 611, § 10.) In view of that provision of the statute the question arises whether the transfer by a director of his stock operates to terminate his relation as such to the company, and if so whether the defendant did effectually for that purpose transfer his stock prior to the creation of the debt upon which the action is founded.

My attention has been called to no other provision of the statute upon the subject of the eligibility of a person for the place of director. And that does not in terms declare that such relation shall terminate when he ceases to be a stockholder. The defendant was such when elected and the statute provided for his retirement only on the election of his successor. But without further considering that question, the inquiry arises, Did the plaintiff, as between him and the company cease to be a director before such debt was contracted? By reference to the statute it is seen that "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the corporation according to the provisions of the act, until it shall have been entered" in the book referred to "by an entry showing from and to whom transferred." (Id. § 17.) And the by-law of the company provided that transfers of shares should "only be made upon the books of the company" in the manner there directed. The defendant owned eighty shares of the stock, and no more than seventy-five of them were transferred upon the books of the company, and as between him and it, his relation of stockholder of five shares continued. (*Adderly v. Storm*, 6 Hill, 624; *Worrall v. Judson*, 5 Barb. 210; *Rosevelt v. Brown*, 11 N. Y. 148.)

It would seem that the question here is not in the fact whether the defendant had transferred his stock so as to vest title to it in another as between them, but is, what was his relation which the company could treat him as having to it, as it is between him and the corporation that the inquiry would arise whether or not he continued to be one of its directors. And for the purpose of his eligibility he would

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properly be treated by the company as a stockholder until his transfer was entered on the book. If that view is sound, he never, as to the company, ceased to have five shares of the stock after he was elected director.

While it is true he made and delivered to Jones the certificate with an assignment upon it covering the eighty shares without consideration, it appears that when the certificate was surrendered and new ones taken the shares were so divided that Jones took seventy-five, and certificate for the other five was issued to the defendant. All inferences of fact legitimately arising from such transaction and bearing in that direction are to be taken in support of the recovery.

These suggestions lead to the conclusion that the judgment should be affirmed.

All concur, with PARKER, J., except BRADLEY, J., dissenting.
Judgment reversed.

CLARENCE R. CONGER, Appellant, v. JOHN TREADWAY,
Respondent.

A cemetery was formerly owned by eleven persons as tenants in common; eight of them executed a power of attorney to G. and M. to sell and convey lots therein. M. did not act. G. undertook the execution of the power and continued to sell lots until he became disabled. Thereafter B. acted as attorney. In an action of ejectment to recover a lot in the cemetery, plaintiff claimed title under a sale in an action for partition between the original owners or their successors in title. Defendant claimed the lot by virtue of a purchase from G., and payment of part of the purchase-price to B., with agreement to pay the balance when the deed was delivered. It appeared that B. acted as attorney for a number of years, collecting money and paying the liabilities of the owner, and kept a book in which sales of lots were entered, in which was entered the sale of the lot to defendant. Defendant, immediately after his purchase, took possession of the lot, improved, graded and sodded it, buried seven persons therein and had been in possession for over twenty years. No deed was ever tendered to him. *Held*, that a verdict was properly directed for defendant; that while no express authority for B. to act as attorney was shown, the fact that he did so with the knowledge and consent of the owners necessarily raised the inference of authority, and

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defendant, therefore, was rightfully in possession, and if the contract for the purchase was to be considered as executory, he was entitled to possession until the production and delivery to him of a deed; if not executory, he having entered under claim of title, acquired title by adverse possession.

(Argued March 7, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of defendant, entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are set forth in the opinion.

Irving Brown for appellant. The defendant was erroneously permitted to testify in his own behalf to conversations and transactions with Gurnee concerning these lands and the lot in question, with the purpose of establishing acquiescence on the part of Gurnee, then an owner, in his claim of right to the possession or ownership of the plot in question. (Code Civ. Pro. § 829; *Chaffee v. Goddard*, 42 Hun, 150; *Holcomb v. Holcomb*, 95 N. Y. 317; *Stuart v. Paterson*, 37 Hun, 119; *Oliver v. Freleigh*, 36 id. 633.) The defendant having been unable to show any authority on the part of Richard T. Blanche to act for the owners, his payment to him of part of the amount agreed on with Gurnee was no payment for the plot, and the tender of "the balance" was no tender. The defendant is in the position of neglecting or refusing to perform, and ejectment lies. (*Marvin v. Wilbur*, 52 N. Y. 270; *Snook v. Lord*, 56 id. 605; *Scott v. Stevenson*, 3 Hun, 352; *People v. Parish*, 4 Den. 153; *Ives v. Davenport*, 3 Hill, 373.) In no case can it be assumed that Gurnee was authorized to act for Isaiah Milburn (his co-attorney), or for Daniel R. Weed, who did not execute the power. The defendant was unable to give proof of this, and the strongest claim he can make for his alleged contract with Gurnee is that it entitles him to nine undivided elevenths of the land. He is even so a tenant in common, claiming exclusive possession against his co-tenant, and eject-

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ment was the plaintiff's only remedy against him. (*Newton v. Bronson*, 13 N. Y. 587; *Florence v. Hopkins*, 46 id. 182.) Defendant is not now in a position to demand specific performance of the contract, even if it were binding on the plaintiff. (*Delavan v. Duncan*, 49 N. Y. 487, 488; *Guest v. Humphrey*, 5 Ves. 818, 823; *Edgerton v. Peckham*, 11 Paige, 352; *Finch v. Parker*, 49 N. Y. 1; *Milward v. Thanet*, 5 Ves. 720.)

Geo. W. Weiant for respondent. An equitable title may be interposed as a defense in an action of ejectment. (*Glacken v. Brown*, 39 Hun, 294; *Risley v. Price*, 40 Hun, 585; Code Civ. Pro. § 507.) The facts proved showed the defendant to be a purchaser in possession and not in default. (*Kelly v. Burrows*, 102 N. Y. 93.) The evidence being such that a verdict for the defendant could have been sustained, the direction to find such verdict was not error. (*Stratford v. Jones*, 97 N. Y. 586; *Mayor v. Sands*, 39 Hun, 519; *O'Neil v. James*, 43 N. Y. 84; *Nichols v. Martin*, 35 Hun, 168-173; *Village of Port Jervis v. F. N. Bank*, 96 N. Y. 550-560.) It was competent to give in evidence the statements and acts of John S. Gurnee, wherein he was acting as agent of the owners of the cemetery. (*Hildebrandt v. Crawford*, 65 N. Y. 107; *Pratt v. Elkins*, 80 id. 196; *Chadwick v. Turner*, 69 id. 404; *Worrall v. Munn*, 5 id. 229.) No technicality should avail plaintiff. (*Conger v. Treadway*, 3 N. Y. Supp. 152; 7 id. 809.)

HAIGHT, J. This action is in ejectment to recover a plot of ground known as lot No. 192 of Mount Repose cemetery in Haverstraw, N. Y.

The cemetery was formerly owned by eleven persons as tenants in common. In the month of April, 1854, a power of attorney was executed by eight of the tenants in common to John S. Gurnee and Isaiah Milburn, to grant, bargain and sell the premises in question for such sums or prices as to them shall seem meet, and to execute, acknowledge and deliver good

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and sufficient deeds and conveyances for the same. Daniel R. Weed, one of the owners, did not join in this power of attorney, and it appears that Isaiah Milburn, one of the attorneys so appointed, took no active part therein. Gurnee undertook the execution of the power and continued to sell lots as long as he was physically able to attend to the matter, and thereafter, and after his death, R. T. Blanche, his son-in-law, acted as the attorney and controller of the owners for the space of about eight years, and until his death.

The plaintiff claims to be the owner by reason of a purchase under a sale made in an action to partition among the original owners or their heirs or devisees.

Upon the trial the defendant was permitted to testify that he purchased the lot in question of Gurnee, agreeing to pay therefor the sum of \$72.50; that he entered possession and buried his daughter therein more than twenty years before this action was brought, and has since buried his wife and five grandchildren therein.

Inasmuch as Gurnee was one of the tenants in common, and at the time this action was tried was deceased, there may be some question as to the right of the defendant to testify to the personal transaction he claims to have had with him.

We shall, therefore, for the purposes of this action, disregard that evidence, and from that which remains determine whether the trial court properly directed a verdict.

It is contended that Blanche had no authority to act for the owners in selling burial lots, but it appears that he did so act for a number of years with their knowledge; that he collected money and paid the liabilities of the owners; kept a book in which the sales of lots were entered, with the amounts paid, etc. These facts fully appear from the testimony of McKenzie, the secretary of the association, and from the widow of Blanche. On the book kept by Blanche of the sale of the burial lots, there appears the following entry:

"April 22, 67, John Treadway, 192 — 21x23 — 483 — \$72.50."

From which we understand that on April 22, 1867, he sold

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the defendant lot No. 192, being twenty-one feet by twenty-three feet, amounting to four hundred and eighty-three square feet, for \$72.50. On November 1, 1869, the defendant paid Blanche \$30.47 as part payment for lot No. 192 and took his receipt therefor, and at the same time agreed to pay the balance of the purchase-money upon the production and delivery of a deed thereof. No deed has ever been tendered him or demand made for the balance of the purchase-money.

Under these facts the trial court directed a verdict for the defendant, and we think properly.

It is evident from the facts that Blanche acted as the attorney of the owners with their knowledge and consent. The land, as we have seen, was devoted by its owners to burial purposes. It was not convenient or practicable for them all to act in the sale of lots, and so it was thought advisable to appoint some one to act for them. And whilst there is a failure to show express authority for Blanche to sell, still, we think, under the evidence, the inference of necessity exists that they had given him such authority. It follows that the defendant is rightfully in possession. If, as is claimed, his contract of purchase is still executory, then under the agreement he was entitled to the possession until the production and delivery to him of a deed of the premises. The failure of the owners to tender a deed has not put the defendant in default. As we have seen, the lot was more than twenty years ago occupied by the defendant for the burial of his dead. On it rest his daughter, his wife and five of his grandchildren. The lot was improved, graded, sodded, and every year he has caused flowers to be planted thereon. His possession has been as exclusive as the nature of the circumstances would permit for upwards of twenty years. He entered under a claim of title through purchase, and if his contract were not executory, his title by adverse possession would be complete.

The judgment should consequently be affirmed.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

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JOHN I. D. BRISTOL, Appellant, v. THE EQUITABLE LIFE
ASSURANCE SOCIETY of New York, Respondent.

The originator or proprietor of an idea, trade, secret or system, which cannot be sold, negotiated or used without disclosure, must himself protect it from disclosure by some contract, and if he discloses it to another without contract, or any agreement as to compensation, the other is entitled to use it, and, if he does so use it to his benefit, he incurs no liability to the one who made the disclosure.

Plaintiff's complaint alleged in substance that, to induce defendant to employ him, he communicated to it, in confidence, a new system of soliciting insurance business; that defendant, without plaintiff's knowledge, commenced the use of the system, and continued its use against his protests after discovery, and thereby obtained a large amount of business. Plaintiff asked for an accounting and payment of a reasonable compensation. On demurrer to the complaint, *held*, that it did not set forth a cause of action.

Reported below, 52 Hun, 161.

(Argued March 7, 1892; decided March 23, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 29, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to obtain an accounting and recover compensation for communicating to defendant a new system for soliciting life insurance, which plaintiff alleged, after a confidential disclosure thereof by him in a letter requesting employment, was adopted by defendant and used without his knowledge, and the use was continued, notwithstanding his protests, after discovery of its use, whereby defendant obtained a large amount of business.

Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was sustained.

Further facts are stated in the opinion.

Raphael J. Moses for appellant. The right of property exists in a definite collocation of ideas forming a new and

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useful system of transacting a lawful business. (*Kiernan v. M. Q. Co.*, 50 How. Pr. 104; *Miller v. Taylor*, 4 Burr. 2303; 2 Story's Eq. Juris. §§ 943, 950; *Hay v. McKenzie*, 3 Barb. Ch. 320; *Wheaton v. Peters*, 8 Pet. 591, 608; *Little v. Hall*, 18 How. Pr. 165; *Prince Albert v. Strange*, 1 McN. & G. 96; *Denis v. Leclerk*, 1 Mod. 207; *Folsom v. Marsh*, 2 Story, 100; *Wetmore v. Scoville*, 3 Edw. Ch. 515; *United States v. Tanner*, 6 McC. 128; *Eire v. Higbee*, 22 How. Pr. 198; *Grigsby v. Breckinridge*, 2 Bush, 480; *Macklin v. Richardson*, Ambler, 694; *Boucicault v. Fox*, 5 Blatchf. 98; *Keene v. Kemble*, 16 Gray, 945; *Tenor v. Robinson*, 10 Ir. Ch. 134; *Boulanger v. McKay*, 15 Blatchf. 561; *Ehret v. Pierce*, 18 id. 302; *Cobbitt v. Woodward*, L. R. [13 Eq.] 307; *Maple v. J. A. & N. Series*, L. R. [23 Ch. Div.] 369; *Dix v. Brooks*, L. R. [15 Ch. Div.] 22; *Burns v. Woodruff*, 4 Wash. 48; *Donald v. Becket*, 4 H. L. Cas. 1774.) Before publication, literary property exists and will be protected by the courts. (2 Swanst. 424; 2 Itk. 342; Amb. 739; 1 Wm. Bl. 331; Id. 330; 4 Burr. 2408; 2 DeG. & S. 692; 1 McN. & G. 25; 4 H. of L. 815; *Palmer v. De Witt*, 47 N. Y. 532.) Treated in the nature of a trade secret, the plaintiff is entitled to protection and damages for violation of the secret obtained in confidence. (Browne on Trade-marks, § 545; *Peabody v. Norfolk*, 98 Mass. 408; *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 373, 374; *Jarvis v. Peck*, 10 Paige, 118; *Morrison v. Moat*, 9 Hare, 255; *Bryson v. Whitehead*, 1 Sims. Ch. 74.)

Charles B. Alexander for respondent. This is an equitable action, not an action at law. (*Stevens v. Mayor, etc.*, 84 N. Y. 304; *Hammond v. Morgan*, 101 id. 186; *Gould v. C. C. Bank*, 86 id. 83; *Kelly v. Downing*, 42 id. 71; *Alexander v. Katte*, 63 How. Pr. 262; *Taylor v. C. O. L. Ins. Co.*, 9 Daly, 489; *Edson v. Girvan*, 29 Hun, 424; *Murtha v. Curley*, 90 N. Y. 372; *Covert v. Henneberger*, 53 How. Pr. 1; *Fisher v. C. O. L. Ins. Co.*, 20 J. & S. 179; *Watson v. M. R. Co.*, 17 Abb. [N. C.] 296; *Moores v. Townshend*, 102 N. Y. 391;

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Heywood v. City of Buffalo, 14 id. 534; *Bockes v. Lansing*, 74 id. 437; *R. E. Bank v. Eames*, 1 Keyes, 588; *Mann v. Fairchild*, 2 id. 112; *Crosby v. Watts*, 9 J. & S. 208; *Wilson v. Mallett*, 4 Sandf. 112.) Viewed as a bill in equity for an accounting and discovery, the demurrer must be sustained. (*Phillips v. Phillips*, 9 Hare Ch. 471; *Root v. R. R. Co.*, 105 U. S. 189; *Smith v. L. & S. E. R. Co.*, Kay, 408; *Baily v. Taylor*, 1 R. & M. 73; *Jewett v. Bowman*, 29 N. J. Eq. 174; *Badger v. McNamara*, 123 Mass. 117; Pom. Eq. Juris. § 178; *Uhlman v. N. Y. L. Ins. Co.*, 109 N. Y. 421; *Porter v. Spencer*, 2 Johns. Ch. 169; *Seymour v. L. D. Co.*, 20 N. J. Eq. 396; *Dinwiddie v. Bailey*, 6 Ves. 136.) The complaint shows no demand on the defendants for the information desired. (*Lynch v. Willard*, 6 Johns. Ch. 346.) There was no agreement here, because there was no assent of the defendant to the offer. (Pars. on Cont. 475.) The mere use of the ideas or thoughts of another does not create a cause of action. (*Stowe v. Thomas*, 2 Wall. 547; *Read v. Conquest*, 9 U. S. [N. S.] 755; *Brown v. Piper*, 91 U. S. 41; *Morton v. N. Y. E. Infirmary*, 5 Blatch. 116; *Earle v. Sawyer*, 4 Mason, 6; *Whittemore v. Cutter*, 1 Gall. 478; *Palmer v. De Witt*, 47 N. Y. 537; *Woolsey v. Judd*, 4 Duer, 379; *Wheaton v. Peters*, 8 Pet. 591; *Millar v. Taylor*, 4 Burr. 2303; *Donaldsons v. Becket*, Id. 2408; *Gillett v. Bate*, 86 N. Y. 94; *Hesse v. Stevenson*, 3 B. & P. 56; *Folsom v. Marsh*, 2 Story, 100; *Keene v. Kemball*, 16 Gray, 545; *Merrill v. Calkins*, 10 Hun, 495; *Oakley v. Stanley*, 5 Wend. 523; Angell on Water-courses, § 158; *Gillet v. Mason*, 7 Johns. 16; *Amory v. Flynn*, 10 id. 102; *Ferguson v. Miller*, 1 Cow. 243; *Hogg v. Emerson*, 6 How. [U. S.] 437; *Keene v. Clark*, 5 Robt. 58.)

LANDON, J. Assuming, without deciding, that if the defendant has wrongfully appropriated, or converted to its own use, the plaintiff's property, or infringed upon his property rights or privileges, and has, without right, made use of them, it ought to respond to the plaintiff for such use, and should ren-

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der an account to him respecting the same, the question arises upon this complaint whether the subject of the appropriation and use constituted property or property rights of the plaintiff.

The plaintiff does not allege that he was the exclusive possessor of the system. His letter to the defendant instances several companies which have used it to advantage, and states that "underlying the whole system is a common sense plan of advertising." Its use seems to be its disclosure. He does not complain of the use that the defendant has made of it, but seeks to recover for it as if defendant had used his property. His case is unlike those in which the injunctive process of the court is sought to restrain the disclosure of a secret, or the publication of a letter, which may prove injurious to business or character.

Nor is his case like that of one who writes a tale or treatise, or play, or composes a piece of music, or paints a picture, or makes an invention; in such cases there is a production which can, by multiplying copies, be put to marketable use and its exclusive ownership be easily preserved and protected. Whoever infringes takes benefits or profits which otherwise would naturally come to the producer. Here the defendant has taken from the plaintiff no profits nor diverted them from him.

Without denying that there may be property in an idea, or trade secret or system, it is obvious that its originator or proprietor must himself protect it from escape or disclosure. If it cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it. (*Peabody v. Norfolk*, 98 Mass. 452.)

The allegation of the complaint that the defendant disclosed the system in confidence to the defendant is vague. It does not necessarily mean that the defendant agreed not to use it; it may mean something else. Defendant is at liberty to conduct its business in its own way; it obtained a valuable hint

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from the plaintiff and assumed no legal obligation to pay the plaintiff if it should conclude to act upon it.

Plaintiff communicated his system without marketing it. It was valuable to the defendant. But what has plaintiff lost thereby? He alleges nothing more than the loss of the sale to a single party who refused to buy. The system, we may assume, was valuable to those who had insurance to sell. Plaintiff does not allege that he had any to sell. He does not allege that his system was marketable or might have been made so but for the use made of it by defendant.

A. wishes to sell his house and lot. B. tells him in confidence that C. desires to buy it, and B. solicits employment to negotiate the sale. A. declines, but acting upon B.'s communication meets C., and himself negotiates and closes the contract of sale. B. has no cause of action against A. He had information which he hoped to market, but he parted with it without finding any market.

The plaintiff himself communicated his system to the defendant to induce it to employ him, and thus used it as an attractive adjunct to his own self commendation or in corroboration of it. He could not induce the defendant to "adopt this system and the writer with it." Yet as the defendant acted upon the hint the plaintiff gave to it and found it profitable to do so, the plaintiff asks the defendant to pay him a percentage of its profits.

We do not think the complaint states a cause of action.

Judgment should be affirmed.

All concur, except VANN, J., not sitting.

Judgment affirmed.

Statement of case.

JERONEMUS S. UNDERHILL, Respondent, v. SAMUEL COLLINS,
Appellant.

182	269
d162	895
d162	896
d162	897

It seems the acceptance by the landlord of the surrender of demised premises will prevent the recovery of rent thereafter accruing, and if the landlord takes possession after a surrender and re-lets the premises to another, he will be deemed to have accepted the surrender, unless there are facts rebutting this inference.

Where, however, it appeared that the landlord refused to accept a surrender and notified the tenant that he would hold him for the rent, but stated that he would lease the premises for the tenant's benefit, and thereupon the latter left the premises and subsequently the landlord leased them to another, *held*, that there was no acceptance of the surrender; that the renting was for defendant's benefit and on his account; and that the landlord was entitled to recover the rent stipulated, less the amount received from the new tenant.

Hall v. Gould (18 N. Y. 127), distinguished.

(Argued March 8, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

P. Q. Eckerson for appellant. The motion to dismiss was on two grounds, one that there had been a surrender and acceptance, and the other was that on the facts as proven, plaintiff could not recover rent as such. This should have been granted. (*Hall v. Gould*, 13 N. Y. 127; *Conger v. Duryee*, 90 id. 600; *Horton v. N. Y. C. R. R. Co.*, 12 Abb. [N. C.] 39; *McAdam on Land. & Ten.* 330-474; *McKensie v. Farrell*, 4 Bost. 204; *Taylor on Land. & Ten.* § 516; *McKellar v. Sigler*, 47 How. Pr. 22; *Wills v. Atchison*, 24 Eng. C. L. 228; *Bedford v. Terhune*, 30 N. Y. 462; *Schieffelin v. Carpenter*, 15 Wend. 400; 3 Wait's Act. & Def. 212, 213.)

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Charles M. Demond for respondent. There was a *prima facie* case for the plaintiff; it was not incumbent upon him to show affirmatively that he had notified the defendant that he would hold him and would relet the premises for his benefit if he went. (*Morgan v. Smith*, 70 N. Y. 537; *McAdam on Land. & Ten.* 467, 475; *Bloomer v. Merrill*, 29 How. Pr. 259; 1 Daly, 485; *Goelet v. Ross*, 15 Abb. Pr. 251; *Townsend v. Alpers*, 3 E. D. Smith, 560; *Thomas v. Nelson*, 69 N. Y. 118.) The judge's charge was in accordance with the law. (3 R. S. [7th ed.] 2326, § 6; *Smith v. Devlin*, 23 N. Y. 363; *Fuller v. Ruby*, 10 Gra. 285; *Campbell v. Shields*, 11 How. Pr. 565; *McAdam on Land. & Ten.* 477, 491; *Johnson v. Openheimer*, 2 J. & S. 416; 55 N. Y. 280.) The motion for a new trial on the minutes was not well founded. (*Beckwith v. R. R. Co.*, 64 Barb. 299; *Houck v. Stephenson*, 8 J. & S. 543; *Cothran v. Collins*, 29 How. Pr. 155.) The action was for rent and not for damages. (*Hall v. Gould*, 13 N. Y. 134.)

X HAIGHT, J. This action was brought to recover rent.

On September 30, 1886, the plaintiff leased to the defendant a room in the building known as No. 50 Broad street, in the city of New York, for the term of three years and seven months. The defendant entered into possession of the premises under the lease and occupied them until the latter part of May, 1888, at which time he vacated them and went away. After leaving the premises he sent the keys by another person to the plaintiff. The keys were tendered to the plaintiff, but he refused to receive them, and they were left upon his desk.

The plaintiff testified to a conversation with the defendant which occurred before he left the premises, in which the defendant asked him to take the premises off from his hands; that the plaintiff refused to do so, and told him that he should hold him for the rent, but would lease the premises for his benefit.

After the defendant left the premises the plaintiff went and examined the same and found the doors unlocked. He then

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returned to his office, took the keys from the desk, locked up the premises and subsequently rented them to another person. The defendant had paid the rent up to June first, and this action was brought for that which subsequently accrued. The recovery was for the rent accrued, less the amount received from the new tenant. X

The defendant claimed that there was a room in the building in which gambling was carried on, and that in consequence there was a breach of the covenant of quiet enjoyment on the part of the plaintiff. But upon this issue the evidence was not sufficient to establish such breach, and the trial court so instructed the jury, and no exception was taken thereto. *omit*

X Upon the trial, and after the plaintiff had rested, the defendant moved to dismiss the complaint on the ground that the plaintiff had accepted a surrender of the premises by leasing them to another party. This motion was denied and an exception taken.

The acceptance by the landlord of the surrender of leased premises would prevent the recovery of rent not already due, and if the landlord takes possession of such premises so surrendered and relets them to other parties, he will be deemed to have accepted a surrender unless there are facts rebutting this inference.

We must, therefore, refer to the evidence for the purpose of determining whether the plaintiff intended to accept a surrender. As we have seen, he refused to accept a surrender of the premises at the interview he had with the defendant. He then told him that he should hold him for the rent; that if he left the premises he would rent them for and on his account. It was under these circumstances that the defendant left the premises and sent the keys by another person to the plaintiff. The plaintiff, in reletting the premises, did only that which he had promised and had the right to do. He could have left the premises vacant during the unexpired term of the lease, and required the tenant to pay the rent as it matured. The reletting of the premises for the benefit of the tenant relieves him in part of the burthen that he otherwise would have had

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to bear. He is, therefore, a gainer rather than a loser by reason of such reletting. It may be true that such reletting would operate as an acceptance of a surrender of the premises unless there is an agreement, express or implied, that such reletting may be made. But under the facts disclosed in the testimony to which we have referred, such agreement or authority may be implied. (McAdam on Landlord and Tenant, §§ 205-210; *Morgan v. Smith*, 70 N. Y. 537-546; *Bloomer v. Merrill*, 1 Daly, 487; *McKensie v. Farrell*, 4 Bosw. 192.)

It is claimed that the action should have been for damages and not for rent accrued. But the relation of landlord and tenant had not ceased to exist. The reletting, as the plaintiff claims, was for the defendant and on his account. The plaintiff but served the defendant as his agent in the transaction.

In the case of *Hall v. Gould* (13 N. Y. 127), the landlord had retaken possession of the premises in consequence of a breach of the lease by the tenant, who had covenanted not to use the premises for any disreputable business. In that case the re-entry of the landlord was held to terminate the lease, and that rent, as such, could, therefore, no longer accrue to the lessor, but he had his right of action for damages for the breach of the covenant.

That case has no application to the question under consideration.

The judgment should be affirmed, with costs.

All concur, except FOLLETT, Ch. J., dissenting.

Judgment affirmed. ✓

Statement of case.

CHARLES F. CARLSON, Appellant, v. THE PHOENIX BRIDGE
COMPANY, Respondent.

132	273
142	34
132	273
164	496

Reasonable care, and not the highest efficiency which skill and foresight can produce is the measure of a master's liability to his servant; he performs his whole duty by using as much care in the selection of materials for the use of his servants as a man of ordinary prudence in the same line of business would, acting with regard to his own safety, use in supplying similar things for himself, were he doing the work.

If material of the best quality is purchased by the master, and there is nothing in its appearance to indicate inefficiency, and tools, for the use of the servant, are constructed therefrom by competent and skilled workmen, the master discharges his duty, and is not liable for an injury to the servant, caused by a breaking of the tool in consequence of a hidden defect in the material.

In an action by an employe of defendant to recover damages for personal injuries alleged to have been caused by defendant's negligence, the following facts appeared: Plaintiff, while in the performance of his duties, was injured by the fall of an iron girder caused by the breaking of an iron hook used in raising the girder. The hook was one of a number made for defendant for such use from a bar of iron purchased by defendant of reputable dealers, and ordered as the "best refined" iron, which was the best grade in the market. All of the other hooks had been used for the same work, and none proved to be weak or insufficient, except the one in question, and this one, during the three months prior to the accident, had been used in lifting girders similar to the one which fell. There was nothing in its external appearance to indicate that it was weak, or not of the best material. The break resulted from a hidden defect in the iron, that could not have been discovered by an external examination, and was not discovered in the process of making the hook, which, when delivered to defendant's employes for use, was supposed to be of the best material. *Held*, that plaintiff was not entitled to recover.

Hegeman v. Western R. R. Co. (13 N. Y. 1), distinguished.

Reported below, 55 Hun, 485.

(Argued March 9, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

Statement of case.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Edward Swanstrom for appellant. Upon an appeal from a judgment dismissing the complaint, the evidence is to be construed most favorably to the plaintiff. (*Harris v. Perry*, 89 N. Y. 308; *Clemence v. City of Auburn*, 66 id. 338.) The defendant was guilty of negligence in failing to use proper care to provide a safe and suitable hook for the work which the plaintiff was called upon to perform. (*McGovern v. C. V. R. R. Co.*, 123 N. Y. 287; *Pantzar v. T. F. I. M. Co.*, 99 id. 368.) The negligence of the defendant's blacksmith arose in the performance of a duty belonging to the defendant to perform as master, hence the defendant is liable for the manner of its performance. (*Bushby v. N. Y., L. E. & W. R. R. Co.*, 107 N. Y. 379; *Mann v. D. & H. C. Co.*, 91 id. 495; *Durkin v. Sharp*, 88 id. 227; *Fuller v. Jewett*, 80 id. 46; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Pantzar v. T. F. I. M. Co.*, 99 id. 368; *Leonard v. Collins*, 70 id. 90.) The General Term erred in holding that the defendant was not required to adopt any precaution in making the hook so long, as the best iron was purchased for the purpose. (*McGovern v. C. V. R. R. Co.*, 123 N. Y. 289.) The General Term erred in holding that the testimony of defendant's superintendent, that he purchased the best iron is controlling. (*C. N. Bank v. Diefendorf*, 123 N. Y. 200; *Elwood v. W. U. T. Co.*, 45 id. 49; *Kavanagh v. Wilson*, 70 id. 172; *Gildersleeve v. Landon*, 73 id. 609; *Koehler v. Adler*, 78 id. 201; *Wohlfahrt v. Beckert*, 92 id. 497.) The question of contributory negligence was, under all the circumstances, one of fact for the jury. (*Stackus v. N. Y. C. R. R. Co.*, 79 N. Y. 464; *Plank v. N. Y. C. R. R. Co.*, 60 id. 607; *Bassett v. Fish*, 75 id. 307; *Kain v. Smith*, 89 id. 379.) The plaintiff did not assume the risk of the accident by which he was injured. (*Bening v. Steinway*, 101 N. Y. 551; *Stringham v. Stewart*, 100 id. 526.)

A. B. Boardman for respondent. The inference of negligence cannot fairly and properly be drawn against the defend-

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ant. (*Burke v. Witherbee*, 98 N. Y. 565.) The blacksmith's failure to cut the iron when it was cold was not, under the circumstances, negligence. (*Probst v. Delamater*, 100 N. Y. 266; *W. R. Co. v. McDaniels*, 107 U. S. 454; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 566; *Baulec v. N. Y. & H. R. R. Co.*, 59 id. 366; *Dwight v. G. L. Ins. Co.*, 103 id. 358.)

BROWN, J. The plaintiff was an employe of the defendant, engaged in the construction of an elevated railway in Fulton street, in the city of Brooklyn, and while in the performance of his duties was injured by the fall of a heavy iron girder and brought this action to recover damages sustained from such injury.

For the purpose of lifting the heavy girders from the street to the elevated position they were to occupy in the structure the defendant used a movable derrick operated by steam power. The hoisting apparatus included a chain and hook.

The plaintiff described the customary method of raising the girders as follows: The hook was fastened into the girders first so as to raise them on edge, and then enough power was applied to raise them clear of the street, so that they could be placed on blocks. After they were placed on blocks, under their proper position in the structure, other tackle was used, the hook and chain being dispensed with, and they were raised into their permanent position. The immediate cause of the accident which injured the plaintiff was the breaking of the hook when the girder was being raised from the street, and the negligence charged upon the defendant was its failure to furnish a hook strong enough to sustain the weight of the girder.

The hook in question was one of a number (testified to be eight or more) made for use in the work of building the railway, by a blacksmith in the defendant's employ. They were made about three months prior to the accident from a bar of iron twenty-four feet long and one and three-quarter inches in diameter, purchased by defendant from Manning, Maxwell & Moore, reputable dealers in iron, and ordered as the "best refined," which was the best grade of iron in the market. All

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of the hooks had been used in raising similar heavy girders and none of them were shown to have been weak or insufficient for the work required of them.

The one in question had been used during the three months previous to the accident to lift about two hundred girders similar to the one which fell upon the plaintiff, and there was nothing in its external appearance to indicate that it was weak or that the material was not of the best quality.

After the accident the iron at the point of fracture was discovered to be bad. The break was square across the shank and presented a bright appearance, without rust, and the proof tended to the conclusion that it resulted from crystallization in the iron, which could not be discovered by an external examination. It was not discoverable in the process of making the hook, and when delivered to the employees for use it was supposed to be of the best material.

The appellant claims and, on the trial, gave evidence to the effect that a customary test to ascertain the quality of a bar of iron could have been made by the blacksmith by nicking or cutting notches in the bar when cold with a chisel or cutter and then breaking it, or by bending it over an anvil. That if broken, the grain of the iron would have been disclosed, and by bending it, if crystallized, it would break, but if fibrous, it would bend. But it was conceded that such a test could not be applied to the particular piece of iron which was used in making the hook without either destroying it or greatly impairing its strength and efficiency. These tests were not applied to any part of the bar in question.

It appeared from uncontradicted testimony introduced by the defendant that all refined iron is subjected to frequent tests during the process of manufacture, and represents in the market the highest efficiency of the manufacturer's skill, and that subsequent to the accident to the plaintiff a piece of the bar in question, reduced in diameter to one and one-half inches, was tested and shown to have a breaking strength of forty-six tons, or more than four times the weight of the girder by which plaintiff was injured.

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This statement of the facts brings us to the point of difference between the parties at the trial.

The plaintiff claimed that the defendant was negligent in omitting to apply to the bar of iron from which the hook was made the test of cutting and breaking or bending, which he claimed would, had it been made, have disclosed the bad quality of the material.

The defendant contended (1) that it was justified so far as the quality of the iron was concerned, in relying upon the fact that it was sold in the market as the best refined by a reputable merchant, and (2) that the defect being a latent one and confined so far as the testimony shows to a very small part of the bar, the jury would not have been authorized to find that the tests aforesaid, if they had been made, would have disclosed the defect complained of.

The rule contended for by the appellant has been applied in cases of injury to passengers. *Hegeman v. Western Railroad Co.* (13 N. Y. 1), was a case of the breaking of the axle of a car. The defect in the iron was latent and could not have been discovered by any external examination. This court held that the defendant was liable for any defect happening during the construction of the car and axle which could have been detected by the manufacturer, though it could not have been detected after they were completed.

But the contrary is held in *Ingalls v. Bills* (9 Metc. 1), which was a case of injury to a passenger in a stage-coach caused by the breaking of an iron axle from an internal defect not apparent by external inspection, and a judgment for the plaintiff was reversed, the court holding that the defendant was not liable when the accident arose from a hidden and internal defect not apparent to a careful examination and the exercise of a most vigilant oversight.

Hegeman's case presents an extreme application of the rule governing the liability of common carriers of passengers. But the rule applicable in cases of master and servant is more favorable to the master. Reasonable care and not the highest efficiency which skill and foresight can produce is the measure

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of the master's liability, and he performs his whole duty by using as much care in the selection of materials for the use of his servants as a man of ordinary prudence in the same line of business would, acting in regard to his own safety, use in supplying similar things for himself were he doing the work. (*Marsh v. Chickering*, 101 N. Y. 390; *Sherman & Redfield on Negligence*, § 195.)

A master who puts a tool or implement into his servant's hand may procure it in several ways. He may buy it ready made of a dealer, procure it to be manufactured or purchase the materials and manufacture it himself. Liability for an injury resulting from a defect in the materials of a tool will be determined by the same rule in each case. If a hook like the one used in the present case had been procured ready made in the market or manufactured at a foundry, the defendant would necessarily have been compelled to rely upon the dealer and manufacturer for the quality of materials used. A completed hook ready for use could neither be cut into with a chisel, or bent over an anvil, without impairing its strength, or perhaps destroying it altogether. A test of that character applied to one of a lot would be no guaranty of the quality of the others. To apply such a test, therefore, to tools procured in that way is impracticable, and such articles are not usually tested before they are put in use. The modern industrial system rests upon confidence in others. A railroad corporation cannot well apply such tests to the materials of which its cars and engines are made, or to the rails which form its tracks. Reasonable inspection is necessary and required. But when articles are manufactured by a process approved by use and experience and apparently properly finished and stamped, it is not usual for them to be tested again in quality, and such examinations are not generally required by law. If materials of the best quality are purchased and tools constructed from them by competent and skillful workmen, if there is nothing in the appearance of the material to indicate inefficiency, men in the ordinary affairs of life use them and place them in the hands of their servants, and there were no circum-

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stances surrounding the manufacture of the hook in question to induce a prudent man to depart from the usual course, or to adopt extraordinary care and precaution.

All the best iron and steel is made in a few large establishments. The evidence shows that all practicable tests are used during the process of manufacture, and the completed product represents the best article that can be produced. It passes into the hands of dealers, and so reaches the consumer. If the best refined iron is required, the purchaser may assume that the tests necessary to produce that article have been properly made and the work properly done. He must see that the work he undertakes to do is properly performed, but if the tool breaks from an internal defect in the material, not apparent from an external examination of the iron, or in the process of making the tool, the master is no more responsible than he would be if he had purchased it ready made in the market, or if it had broken from an external apparent defect produced by use of which he was not chargeable with knowledge.

The evidence in the case shows that the several hooks made by the blacksmith were made from pieces of iron about eighteen inches long, cut from the bar purchased by the defendant's superintendent. Of the hooks other than the one which broke, it appears that they were used in lifting the heavy girders which formed a part of the structure for the railway. None of them were shown to have broken, or to have been weak or defective. The piece of the bar not used was shown to have been of the best quality, and that it possessed an elasticity and strength far beyond that required in lifting the girder in question. The hook that broke, did so from a weakness in the iron at the particular point of fracture. There is no evidence to show that the bad quality of the iron there observable extended to any other part of the bar, and it is obvious, we think, that if the test of cutting and bending the bar while cold had been applied, it could not necessarily have disclosed the defect in question. The evidence does not show what part of the bar the piece of iron from which the

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hook was manufactured was taken, and if the cutting test had been applied to either end or the middle of the bar, the jury could not have found that it would have disclosed the defect complained of. A conclusion that the defect would have been discovered, would have had no other basis than speculation or conjecture, and evidence of that character would be insufficient to sustain a judgment.

We are of the opinion that the complaint was properly dismissed, and the judgment should be affirmed.

All concur.

Judgment affirmed. _____

132	280
167	207

GEORGE BORK, Respondent, v. ALEXANDER MARTIN, Appellant.

Where land has been conveyed to a party upon an oral trust, invalid under the Statutes of Frauds and of Uses and Trusts (2 R. S. 134, § 6; 1 id. 728, § 51), it is lawful for him to perform it, and if he conveys the land and receives the proceeds, the law will treat him as a trustee of personal property realized for the benefit of the *cestui que trust*, who may maintain an action against him to recover such proceeds.

The courts will not allow the Statute of Frauds to be used as an instrument of fraud.

H. held the title of certain lots in the city of B., as security for an indebtedness of J. At the request of J., and upon the agreement of plaintiff to pay the indebtedness, he conveyed the lots to defendant, who agreed to hold them for plaintiff's sole use and benefit, subject to his direction respecting sales thereof, and to pay over the proceeds of such sales. Plaintiff paid J.'s indebtedness and from time to time negotiated sales of lots, which defendant deeded at his request. Plaintiff having negotiated a sale of the remaining lots, defendant refused to execute deeds to the purchasers unless the consideration was paid to his wife which was done, plaintiff advancing the money in order to procure the deeds. *Held*, that plaintiff was entitled to recover of defendant the sum so paid; that while the statutes may have justified the defendant in refusing to dispose of the land, having done this he was no longer protected, but held the money under a parol trust which was valid; that plaintiff had the right to advance the money, and that the payment to the wife was not voluntary.

Plaintiff's complaint alleged the conveyance of the premises to defendant upon a trust substantially as stated, the sale of the remaining lots, the receipt by defendant of the purchase-money, and his refusal to pay over the same and then further alleged that defendant "has fraudulently and

Statement of case.

dishonestly appropriated the said moneys, and converted them to his own use." *Held*, that this averment did not necessarily characterize the action as one of trover; and that it might be rejected.

(Argued March 10, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made October 13, 1890, which overruled defendant's exceptions and ordered judgment for plaintiff on a verdict for plaintiff directed by the court.

This was an action to recover the purchase-price received by defendant for certain lots in the city of Buffalo.

On September 7, 1883, Henry Box held the legal title to certain lots of land in Buffalo, but in fact, and as conceded by him, as security for the indebtedness of Jos. Bork to him in the sum of \$4,000. Jos. Bork was about to leave Buffalo for a long absence, and he desired to transfer his equity to the plaintiff and have the plaintiff assume the payment to Box; he requested Box to convey the lands to the defendant upon the plaintiff's agreement to pay Box \$4,000. This plaintiff agreed to do. Box then conveyed the lands to the defendant and plaintiff subsequently paid Box the \$4,000. As part of the transaction the plaintiff and Jos. Bork orally agreed with the defendant that the latter should hold the lands for the sole use and benefit of the plaintiff and subject to his direction respecting the sale of it or any part of it, and pay him the proceeds of such sales, and the defendant received the deed from Box in pursuance of the oral agreement. •

The defendant neither paid nor agreed to pay any consideration for the deed or lands. From time to time the plaintiff negotiated sales of lots, parcels of the entire premises, and upon his request defendant executed and delivered deeds thereof to the respective purchasers and paid plaintiff the proceeds. But about May 1, 1888, plaintiff having negotiated the sales of five lots more, the defendant refused to execute the deeds to the purchasers unless the consideration should be paid to him.

Plaintiff, in order to obtain the deeds for the purchasers,

Statement of case.

advanced the consideration, \$1,980, and upon defendant's direction delivered it to the defendant's wife. Whereupon defendant delivered the deeds for the purchasers. Plaintiff afterwards demanded of the defendant payment of the \$1,980, which being refused, this action was brought. The complaint alleged plaintiff's equitable ownership of the premises; that they were conveyed by Box to the defendant upon a trust, substantially as above set forth; the sale of the premises; the receipt by defendant of the purchase-money, and his refusal to pay the same to plaintiff.

The complaint further alleged that the defendant "has fraudulently and dishonestly appropriated the said moneys and converted them to his own use."

The answer was a general denial.

Further facts are stated in the opinion.

Adelbert Moot for appellant. No cause of action in trover was shown, and the only cause of action alleged was in trover. (*Decker v. Saltzman*, 59 N. Y. 375; *People v. Dennison*, 84 id. 272; *Southwick v. Bank of Memphis*, Id. 420; *Hood v. Hood*, 85 id. 561.) The rules of evidence and the statute forbid that mere oral evidence shall be received to contradict a deed of land under seal and show that it is or was held in oral trust for another. (3 R. S. [7th ed.] §§ 49, 51; *Garfield v. Hatmaker*, 15 N. Y. 475; *Everett v. Everett*, 48 id. 218; *Underwood v. Sutcliffe*, 77 id. 58; 2 Pom. Eq. Juris. §§ 866, 1042; *Cook v. Barr*, 44 N. Y. 156; *Eighmie v. Taylor*, 98 id. 288; *Drug v. Parker*, 52 id. 494; *Wheeler v. Reynolds*, 66 id. 227; *Jackson v. Post*, 15 Wend. 588; *Loomis v. Loomis*, 60 Barb. 22; *Wilson v. Holbrook*, 64 id. 431; *Lewin on Trusts*, § 693; *Squire v. Harder*, 1 Paige, 493; *O. Bank v. Root*, 3 id. 477; *English v. Marvin*, 128 N. Y. 380.) The money was paid defendant's wife voluntarily, without protest, by David F. Day, acting as attorney for the plaintiff, from the proceeds of mortgages which the plaintiff had obtained through sales of some of these lands, deeded to defendant Martin, by Mr. Box, and such money having been paid to defendant's

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wife, because he insisted that he was entitled thereto, and demanded it as a matter of right, the payment is a voluntary one and the money cannot be recovered back by plaintiff in this action at law. (*Mowatt v. Wright*, 1 Wend. 355; *Clarke v. Dutcher*, 9 Cow. 674; *Suprs. v. Briggs*, 2 Den. 26; *Wyman v. Farnsworth*, 3 Barb. 369; *Flower v. Lance*, 59 N. Y. 603; *Wahl v. Barnum*, 116 id. 87; *Jaffray v. Davis*, 124 id. 164.)

David F. Day for respondent. The statute, by its terms, applies only to cases where a valuable consideration has been paid. (3 R. S. [7th ed.] 2181.) If no trust resulted from the conveyance to the appellant, then, under section 49 of the same act, the deed from Box to the appellant was a nullity, and no estate was conveyed. (3 R. S. [7th ed.] 2180.) To apply to the present case the provisions of our statutes, would be to enable the appellant to appropriate to his own use and benefit the property which he procured to be conveyed to him by his agreement to pay over to the respondent the moneys received for the sale of the same. (*Ryan v. Dox*, 34 N. Y. 367; *Carr v. Carr*, 52 id. 251, 260; *Levy v. Brush*, 45 id. 596; *Wood v. Rabe*, 96 id. 414; *Footte v. Bryant*, 47 id. 544, 547; *Willard's Eq. Juris.* 599; *Hill on Trusts*, 144; *Footte v. Footte*, 58 N. Y. 258; *Martin v. Martin*, 5 Bush. 47.) The real estate which Box conveyed to the appellant, having been held and conveyed by the appellant, in recognition of the trust and confidence reposed in him, and the subject of the controversy in this case being money, personal property, part of the proceeds of such conveyances, the Statute of Uses and Trusts does not apply to the present case. The statute is restricted in its operations to real estate, and does not relate to personalty. (*Robbins v. Robbins*, 89 N. Y. 251; *Day v. Roth*, 18 id. 448; *Tracy v. Tracy*, 3 Brad. 57; *Dunn v. Hornbeck*, 72 N. Y. 80.)

LANDON, J. Joseph Bork, originally having an equity in the premises, and being indebted to Box for about \$4,000, requested Box to take the legal title as security for the debt,

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and also to protect Joseph's equity. Box consented, and although the deed to himself was absolute, he treated it as a mortgage from Joseph, and in equity it was a mortgage. (*Carr v. Carr*, 52 N. Y. 251.) Afterwards, Joseph and his brother, the plaintiff, agreed that the plaintiff should pay Box the mortgage debt, and for that and other considerations, plaintiff should have Joseph's equity in the land. Box consented. To accomplish this, Box conveyed the land upon Joseph's and the plaintiff's request to the defendant, who, paying no consideration, orally agreed to hold the title for plaintiff's convenience and benefit. The plaintiff paid Box the mortgage debt. The premises consisted of twenty-five building lots. Defendant agreed to convey the same, upon plaintiff's request, to such purchasers as the plaintiff should procure, and to pay the purchase-money as received to the plaintiff.

The agreement was fully performed by the defendant, except that after conveying, pursuant to plaintiff's request, twenty of the lots and paying him the purchase-money received, or allowing him to receive it himself, and finally conveying the last five lots pursuant to the like request and receiving the purchase-money, the defendant then refused to pay it to plaintiff.

Thus the present controversy is not in respect of the land, for that has been properly disposed of, but in respect of the purchase-money received by the defendant for the last five lots sold.

Assuming that the land was conveyed to the defendant upon an oral trust, invalid under the Statutes of Frauds and of Uses and Trusts (2 R. S. 134, § 6; 1 id. 728, § 51), yet it was lawful for him to perform it, and he has fully performed it so far as it required him to dispose of the land. The land is all sold and he has the price of the last five lots in his pocket. The language of the cases is to the effect that he cannot, in good conscience, retain it, and that it belongs to the plaintiff. (*Robbins v. Robbins*, 89 N. Y. 258; *Dunn v. Hornbeck*, 72 id. 80; *Foote v. Bryant*, 47 id. 544.)

Though the statutes might have justified the defendant's refusal to dispose of the land as he had orally agreed, yet, having disposed of it, he has voluntarily emerged from the

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field of their protection, and exposed himself to the law which deals with him as a trustee of personal property realized for plaintiff's benefit, by virtue of an agency for the plaintiff which he has so far performed pursuant to the plaintiff's instructions and his own agreement, as to obtain the moneys his agency was constituted to produce. Equity approves his performance, so far as he has performed, and as the statutes referred to no longer apply, there is no law which he can invoke to shield him from the full performance of his duty.

The court will not allow the Statute of Frauds to be used as an instrument of fraud, if it can prevent it. (Cases, *supra*; *Ryan v. Dox*, 34 N. Y. 307; *Lery v. Brest*, 45 id. 596; *Siemon v. Schenk*, 99 id. 598.)

Here the defendant co-operated with the plaintiff for years in the execution of the agreement entered into for plaintiff's benefit, plaintiff the while performing the active labor of negotiating the sale of the lots in full reliance upon defendant's fidelity. In the end when the fruits of the enterprise have come to defendant's hands ready for delivery to the plaintiff, the defendant halts in his fidelity and seeks to appropriate to himself what he agreed to deliver to the plaintiff. He thus seeks to perpetrate a fraud. It is the duty of the court to prevent it.

When the defendant says that it is not fraudulent to refuse to perform a contract which the statute declares to be void, the answer is that he is not charged with a refusal to perform that part of the contract; he has voluntarily performed it. A trust in the money may be established by parol. (*Day v. Roth*, 18 N. Y. 448; *Robbins v. Robbins*, *supra*.) So, too, when the defendant says this money is the proceeds of the sale of his own land, the reply is, that the money is the proceeds of the land which plaintiff entrusted to the defendant to sell for his benefit; that the defendant cannot, with the avails of his agency in his pocket, dispute his agency, or his principal's power to appoint him (*Supervisors of Rensselaer Co. v. Bates*, 17 N. Y. 242); that the statutes relate to land, not to money; that since the defendant has waived his statutory

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protection and converted the land into money, the court will accept both his waiver and performance so far as he has accomplished them, and take up his agency at the point where he has repudiated it; and since it would be unjust to treat the money as land, and thus allow the defendant to recede from his honest performance, the court will not permit it.

The same equitable considerations defeat the application of the statute which declares that where the grant is to one person and the consideration paid by another, no trust results in favor of the latter. The plaintiff seeks to establish no resulting trust in the land. The voluntary performance of the defendant has carried the case beyond that stage, and the trust is in the money which the facts show the defendant received for plaintiff's benefit. It is simply a question whether the defendant can, *ex aequo et bono*, refuse to pay it to plaintiff. The defendant's argument is that if the plaintiff had no equity or estate in the land, he can have none in its proceeds. The common law gave a resulting trust in the land, which, but for the statute, would have vested in the plaintiff. Upon grounds of public policy, none of which is violated by this case, the statute forbade such a concealment of title. The plaintiff, let us assume, paid the consideration for this grant, which vested in the defendant both the interest of Box as mortgagee and the equity of Joseph Bork as mortgagor. Under the circumstances, it was inequitable for the defendant to refuse to recognize the oral trust which he assumed. So long as he held the title to the land, he might have invoked the protection of the statute. But pursuant to his oral trust, he converted the land into money. The law, perceiving that to hold otherwise would promote injustice, says to the defendant, you had the statutory protection so long as you kept the property entrusted to you within its terms, but you have voluntarily and justly converted it into money and thus withdrawn it from the shield of the statute. The plaintiff converted his money into land and allowed you to hold the land exempt from the legal trust and bound only by the moral one. He thus voluntarily placed his property beyond his legal reach. You have now voluntarily

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reconverted it into money and thus replaced it within his legal reach. It was his originally, in good conscience; it was his when the statute enabled you to deny his right; it is now, in good conscience, his with the statutory bar to his taking it voluntarily removed by you. Justice desires to award it to him, and thus finds its way to do it.

If the defendant should say that he now can keep the money, because he might once have kept the land, still the plaintiff can say with better justice that he is now entitled to the money because it was originally his, and though he voluntarily suspended his right to it for a season, he did so without lawful consideration, and in confidence that when it could be restored to him it would be. That time has come, and there is no obstacle to its restoration.

The allegation in the complaint that the defendant "has fraudulently and dishonestly appropriated the said moneys and converted them to his own use" is an unnecessarily strong characterization of defendant's refusal to pay them over to the plaintiff. We do not think the pleader intended to frame his complaint as for trover, and this characterization may be rejected and still leave stated the cause of action upon which the recovery was had.

The objection that the plaintiff voluntarily paid the purchase-money to defendant's wife upon defendant's request, is not supported by the facts. The defendant had the right to receive the purchase-money in the first instance and, therefore, the right to refuse to let the deeds go out of his hands until it was paid to him. The plaintiff had the right, if he chose to do so, to advance it for the purchasers. The defendant simply received what he had the right to ask in his capacity as agent, namely, payment of the purchase-price upon delivery of the deeds.

By adding to that right an unfounded claim did not convert the satisfaction of the claim properly made into a concession of the improper one.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

THOMAS NELSON, Appellant, v. SARAH E. LODER, Respondent.

Where the whole amount secured by a mortgage on real estate is due, a tender of the same by the owner of the mortgaged premises extinguishes the lien of the mortgage, although the tender is not kept good; but it does not discharge the promise or covenant to pay the debt, and for this the debtor remains liable.

If the debtor wishes to extinguish his liability for subsequently accruing interest, or to demand some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time; and so, must keep the tender good.

The right of a subsequent lienor to redeem from a mortgage is derived from the owner of the mortgaged premises, and he is in this respect in no better position than the owner; if, therefore, he wishes to stop interest or compel an assignment of the prior lien, any tender he may make must be as absolute and specific as one made by the owner with like intent.

B. purchased certain premises, subject to a mortgage thereon. After the commencement of an action of foreclosure by the defendant here, who owned the mortgage, B. executed to plaintiff a mortgage on the premises, who exhibited the same to defendant, tendered to her an amount sufficient to pay the sum due on her mortgage, with costs then accrued of the foreclosure suit, and demanded an assignment of her mortgage and the accompanying bond, which she refused. The tender was not kept good, but the money was deposited by plaintiff in his general bank account. In an action to compel an acceptance of the tender and an assignment by defendant of her securities, *held*, that plaintiff was entitled to the assignment, on payment to defendant of the amount due on her bond and mortgage with interest up to the time of payment and foreclosure costs.

Reported below, 55 Hun, 173.

(Argued March 11, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action to compel the assignment of a bond and mortgage and to restrain defendant from prosecuting an action to foreclose the same.

182 288
75 AD*291
132 288
77 AD*323

Statement of case.

April 3, 1876, Josiah G. Clark, being indebted to the Manhattan Life Insurance Company in the sum of \$18,000, executed and delivered a bond to said corporation whereby he bound himself to pay said sum with interest one year after date, and he and Esther, his wife, on the same day executed and delivered to said corporation a mortgage on the land described in the complaint (which the mortgagor then owned in fee) to secure the payment of said sum. The mortgage was duly recorded April 5, 1876. On the 27th of April, 1878, said Josiah G. Clark and Esther, his wife, conveyed the premises to Ada E. Briggs, subject to the amount then unpaid on the bond and mortgage, and she entered into possession of the land, and ever since has remained in possession thereof. September 18, 1878, said mortgagee sold and assigned the bond and mortgage to Charles F. Brown, who, June 3, 1879, sold and assigned them to Sarah E. Loder, the defendant herein. Both assignments were duly recorded prior to September 25, 1880, on which day said Sarah E. Loder began an action to foreclose the bond and mortgage, making Ada E. Briggs a party defendant. When the foreclosure action was begun there was due and unpaid on the bond and mortgage \$3,808.11, with interest from July 1, 1880. On the 18th of October, 1880, said Ada E. Briggs executed and delivered to Thomas Nelson, the plaintiff in this action, a mortgage on said premises to secure the payment of \$500 with interest, April 1, 1881, which mortgage was recorded June 12, 1888. On the 18th of October, 1880, Thomas Nelson called on Sarah E. Loder, exhibited to her his mortgage, and tendered to her a sum sufficient to pay the amount due on her mortgage, with costs of the foreclosure then accrued, and demanded that she assign her bond and mortgage to him, which she refused to do. The tender was not kept good, but the money was deposited by the plaintiff in his general account in a bank. October 23, 1880, this action was begun to compel the defendant to accept the amount due on her bond and mortgage with the accrued costs of foreclosure, and to assign the securities to the plaintiff, and to restrain her from prosecuting her action to foreclose them.

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A temporary injunction was issued. The defendant answered that she had judgments which were liens on the premises subsequent to her and prior to the plaintiff's mortgage, and that she was willing to accept payment of the amount due on her mortgage and cancel the same, and averred that she had offered so to do before this action was begun. The action was brought to trial December 8, 1888, before a Special Term, which held that the plaintiff was entitled to an assignment of the bond and mortgage on the payment by him of the amount due for principal, interest and costs accrued on the 18th of October, 1880, the date of the tender, for which relief a judgment was entered with \$284.98 costs to the plaintiff.

On appeal to the General Term the judgment was modified so that it provided that the plaintiff, upon the payment of \$3,808.11, with interest thereon from July 1, 1880, up to the time of payment, together with the costs which had accrued in the foreclosure action, should be entitled to an assignment of the bond and mortgage. That part of the judgment awarding costs to the plaintiff by the Special Term was reversed, and no costs were allowed to either party in the General Term. From that judgment the plaintiff appealed to this court.

Thomas Nelson for appellant. The judgment of the General Term is founded on the theory that the plaintiff's tender was not kept good — in effect, that the money was not paid into court. A sufficient answer to this is that no objection was taken in the answer nor at the trial for any failure on this score. (*Halpin v. P. Ins. Co.*, 118 N. Y. 166; *Sheridan v. Smith*, 2 Hill, 538; *Roosevelt v. N. Y. & H. R. Co.*, 45 Barb. 558; *Plattner v. Lehman*, 26 Hun, 374.) This is not a case where it was necessary for the plaintiff to pay into court the amount offered to the defendant Loder. (*Flack v. Brown*, 13 Wend. 390-394; *Hoffman v. Steenan*, 4 N. Y. S. R. 629; *Roosevelt v. N. Y. & H. R. Co.*, 45 Barb. 554; *Thurston v. Marsh*, 14 How. Pr. 572; *Bartow v. Cleveland*, 16 id. 364; *Pratt v. Ramsdell*, 16 id. 60; *Wood v. Raber*, 20 J. & S. 479.) It is a well settled principle in equity that junior

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incumbrancers are entitled to redeem a prior mortgage, and be substituted to the rights and interests of the prior mortgagee. (2 Story's Eq. Juris. § 1023; *Clark v. Mackin*, 95 N. Y. 351.) The proper and usual remedy is by action. (*Douglass v. Wadsworth*, 51 Barb. 79; *Twombly v. Cassidy*, 82 N. Y. 156.) It is no objection to the maintenance of this action by the plaintiff that his mortgage covered only a portion of the premises covered by the mortgage of the defendant Loder. (*Averill v. Taylor*, 8 N. Y. 44; *Bogert v. Coburn*, 27 Barb. 230.) It is not material to the case to inquire into the consideration of the mortgage given to the plaintiff. (*Coles v. Malcolm*, 66 N. Y. 367.)

A. S. Cassidy for respondent. The tender made on the 18th day of October, 1880, was not kept good, and the defendant Loder is, therefore, entitled to recover interest upon the bond and mortgage from July 1, 1880, until the payment shall be made, and the assignment be taken. (*Tuthill v. Morris*, 81 N. Y. 94; *Brennick v. Wesilman*, 100 id. 609; *Halpin v. P. Ins. Co.*, 118 id. 165; *Werner v. Tuch*, 127 id. 217; *Day v. Strong*, 29 Hun, 505; *Johnson v. Zink*, 51 N. Y. 335; *Harris v. Jex*, 55 id. 425.) This is an equitable action and, on the facts, the court has the right to compel the payment of the whole interest. (*Werner v. Tuch*, 127 N. Y. 217; *Roosevelt v. B. H. Bank*, 45 Barb. 579; *Jones on Mort.* § 899.) The tender was bad in form, as the plaintiff demanded an assignment of the bond and mortgage. (*Noyes v. Wycoff*, 114 N. Y. 204, 207; *Twombly v. Cassidy*, 82 id. 155.) It cannot be said that we have waived the payment into court. (*Becker v. Boon*, 61 N. Y. 317.)

FOLLETT, Ch. J. Whether the defendant is entitled to interest on the debt secured by her bond and mortgage to the date when she shall be paid by the plaintiff, or only to October 18, 1880, the date of the tender, is the only question involved in this appeal. In case the whole amount secured by a mortgage is due, the tender of the sum unpaid by the owner of the

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mortgaged premises extinguishes the lien of the mortgage, though the tender is not kept good, but it does not discharge the promise or covenant to pay the debt for which the debtor remains liable. (*Kortright v. Cady*, 21 N. Y. 343; *Werner v. Tuck*, 127 id. 217; *Mitchell v. Roberts*, 17 Fed. Rep. 776; 783; *Haynes v. Thom*, 28 N. H. 386, 400; Chitty on Contracts [12th ed.], 787; Jones Mort. § 886.)

If a debtor wishes to extinguish his liability for subsequently accruing interest, or demands some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time. He must keep his tender good. (*Tuthill v. Morris*, 81 N. Y. 94, 100; *Harris v. Jex*, 55 id. 421, 425; *Gyles v. Hall*, 2 P. Wms. 378; *Bishop v. Church*, 2 Ves., Sr. 371; *Garforth v. Bradley*, 2 id. 675; *Stow v. Russell*, 36 Ill. 18; Jones on Mort. § 892; Thomas on Mort. § 399; Coote on Mort. [4th ed.] 885.)

A subsequent lienor's right to redeem a prior security is derived from the owner of the mortgaged premises, and he is in this respect, in no better position than the owner, and his tender, if he wishes to stop interest or compel an assignment of the prior lien, must be as absolute and specific as that which the owner is required to make as a ground for affirmative relief or to stop the running of interest.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

THE NEW YORK RUBBER COMPANY, Appellant, v. JOHN
ROTHERY et al., Respondents.

182	293
164	321

The title of a riparian proprietor to his water rights in a stream, and his right to redress for their invasion, is not conditional upon a beneficial user of them.

Where, there, is a diversion of the waters of the stream, which materially diminishes its natural flow over the lands of a proprietor below, he may maintain an action and is entitled to recover nominal damages, although he has as yet made no use of the waters, or water enough is left in the stream for the purposes of his business as then conducted.

This right to recover nominal damages is substantial, as it confirms the proprietor's right to the beneficial use of the waters of the stream as it was accustomed to flow before the diversion, and if withheld might tend to impeach or destroy his title by adverse user.

In an action to recover damages for such a diversion the court, after charging that if defendants diverted the waters of the stream, to a degree that materially and appreciably diminished its flow along the lands of plaintiff, the latter was entitled to nominal damages, charged in substance that the question must be determined by the use of the land as it was, and not with reference to the future; that the question was as to whether the water was diverted so as to leave the stream, to a material and appreciable extent, insufficient for the purposes of plaintiff's business, and refused to charge that plaintiff's right to maintain the action and to recover nominal damages did not depend at all upon his showing actual or perceptible damage. *Held*, error.

Reported on a former appeal, 107 N. Y. 310.

(Argued February 9, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 8, 1890, which affirmed a judgment in favor of defendants, entered upon a verdict and also affirmed an order denying a motion for a new trial.

The action was brought to recover damages for the alleged diversion of the waters of a stream. The plaintiff owned two lots, both upon the left bank of the Matteawan creek, extending to the middle of the stream and separated by an intervening lot of a third person.

The defendants owned lands upon the right bank, opposite the plaintiff's lands, and extending up the creek above them.

Statement of case.

Above the plaintiff's lands the defendants had a dam across the stream, from which they diverted the water into a raceway, constructed by them upon their own lands. The raceway was about 300 feet long, eight feet wide and ten feet deep. The water flowed in the race to defendants' factory, was there used, and then discharged into the creek entirely below plaintiff's upper lot, and below the middle of his lower lot. The defendants had expended about \$50,000 in utilizing the water-power and constructing their factory. The plaintiff's lots were not used for manufacturing purposes. The upper lot had a slaughter house upon it and the lower lot a tenement house. The fall in the bed of the stream from defendant's dam to plaintiff's lower lot is ten inches. The evidence tended to show that during the periods of the flow of the normal volume of water in the stream the whole of its waters were diverted into the raceway, except such as escaped through leakage; that there always was some leakage.

Further facts are stated in the opinion.

B. F. Lee for appellant. Diversion of water is a cause of action without proof of actual damage. (*Webb v. P. M. Co.*, 3 Sumn. 189; *Gould on Waters*, § 401; *Parker v. Griswold*, 17 Conn. 288; *Corning v. T. I. & N. Factory*, 40 N. Y. 191; *R. C. Co. v. King*, 14 Ad. & El. [N. S.] 122, 134-139; *Wood v. Waud*, 3 Exch. 748, 772; *Harrop v. Hirst*, L. R. [4 Exch.] 43, 45; *Branch v. Doane*, 18 Conn. 233, 241, 242; *Monroe v. Stickney*, 48 Me. 462; *A. M. Co. v. Goodale*, 46 N. H. 53; *Tuthill v. Scott*, 43 Vt. 525; *Graver v. Sholl*, 42 Penn. St. 58; *Casebeer v. Mowry*, 55 id. 419; *Hendricks v. Cook*, 4 Ga. 241, 260; *Stein v. Boden*, 24 Ala. 130; *Stein v. Ashby*, 24 id. 521; *Scriven v. Smith*, 100 N. Y. 471; 2 Washb. on Real Prop. [5th ed.] 366-368, 393; 3 Kent's Comm. 438; *Crooker v. Bragg*, 10 Wend. 264.) The refusal of the learned trial judge to charge that the plaintiff's right to maintain this action and to recover a verdict for nominal damages does not depend at all upon the plaintiff's showing any actual or any perceptible damage, but solely upon the question whether the

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defendants have, by the use of their race, at any season of the year, diverted water from Matteawan creek, and thereby have reduced perceptibly and materially the volume or current of water which otherwise would have flowed by the plaintiff's premises, was error. (*Garwood v. N. Y. C. & H. R. R. R. Co.*, 116 N. Y. 649.)

H. H. Hustis for respondents. It is not an error to refuse to charge that which has already been charged, although the language used is different, but is in substance the same. (*N. Y. R. Co. v. Rothery*, 112 N. Y. 592; *Poulin v. B. & S. A. R. R. Co.*, 61 id. 621.)

LANDON, J. Upon the former appeal (107 N. Y. 310) this court held that it was for the jury to determine upon the evidence whether the plaintiff's riparian rights were injured by the defendants' use of the water; that the test was whether that use "was such that at various times the quantity which would otherwise have flowed past plaintiff's lots was perceptibly and materially diminished, and to such an extent that frequently when the water was running through the tail-race of defendants there was none running over or through the dam except leakage, and, of course, none flowing past the plaintiff's lots, the whole substantial part of the water of the stream going through defendant's tail-race instead of down its original and natural channel." Upon the retrial the evidence was addressed to this subject, and the question presented upon the present appeal is whether the plaintiff's exceptions to the charge of the learned trial court and to the refusals to charge are valid.

The court charged the jury that if the defendants used and diverted the water to a degree that materially and appreciably lessened its flow along the lots of the plaintiff, the plaintiff was entitled to recover nominal damages. But the court also charged: "These defendants have the right to use this water to run their wheel, provided they do not interfere with the stream to an extent which you can say is both appreciable and material. That question will, of course, be determined with

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reference to the land as it was, and not with reference to the future for an instant. Be sure as to that; do not change the question from just what it is: Have the Rotherys, by this water-course, diverted the water so as to leave the stream to a material and appreciable extent insufficient for the purposes of plaintiff's business? Now, gentlemen, that is all there is of the case." The plaintiff excepted to this portion of the charge and requested the court to charge "that the plaintiff's right to maintain this action and to recover a verdict for nominal damages, does not depend at all upon the plaintiff's showing any actual or any perceptible damage, but solely upon the question whether the defendants have, by the use of their race, at any season of the year diverted water from Matteawan creek, and thereby have reduced perceptibly and materially the volume or current of water which otherwise would have flowed by the plaintiff's premises." This was refused.

Both the charge and refusal were erroneous.

The plaintiff's right to recover nominal damages was substantial, though the quantity of damages was not. The defendants probably did leave water enough in the stream for the purposes of the plaintiff's business, as that business had been conducted. But the plaintiff's title to its water rights, and its right to redress for their invasion, were not conditional upon the beneficial user of them. (*Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Crooker v. Brugg*, 10 Wend. 260; *Webb v. Portland Mfg. Co.*, 3 Sumner, 189; *Parker v. Griswold*, 17 Conn. 288; *Clark v. Penn. R. R. Co.*, 22 Atlantic Rep. 989.)

The plaintiff may, however, lose its title by the defendants' prolonged adverse user of the water of the stream, and this is the more probable if such adverse user is protected by the verdict of the jury. It is not improbable that this action was brought to prevent the defendants from acquiring a prescriptive right to divert the water. The charge which makes "the purposes of the plaintiff's business" material to its right to recover and cautions the jury to regard plaintiff's land "as it was, and not with reference to the future," tended to lead the jury to

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disregard the inviolable character of the plaintiff's property rights, or at least expose them to sacrifice if plaintiff's actual and immediate pecuniary damages were inappreciable. The plaintiff might thus lose its right to the beneficial use of the water as it was accustomed to flow before defendants began to divert it, simply because it had not as yet found it convenient to use it. In such a case, nominal damages given confirm the plaintiff's right, but withheld, impeach and may destroy it. (*Hammond v. Zehner*, 21 N. Y. 118.)

The request to charge presented the plaintiff's rights clearly. (*Garwood v. N. Y. C. & H. R. R. Co.*, 116 N. Y. 649.)

The defendants' counsel contends, and his contention is not wholly unsupported, that the court did, in his main charge, instruct the jury substantially as the plaintiff requested, and also instructed the jury substantially and nearly literally in the language of the opinion of this court. The evidence, however, tends to show that the defendants diverted into their race nearly the whole volume of the stream, during a considerable portion of each year, leaving only the small part which escaped from the dam through leakage to flow past the plaintiff's upper lot and the greater part of its lower one. The verdict can hardly be accounted for, except upon the theory that the jury were influenced by that portion of the charge, and by that refusal to charge upon which we have commented. These seem to have prejudiced the plaintiff.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except FOLLETT, Ch. J., not voting.

Judgment reversed.

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JAMES SINGLETON et al., Respondents, v. THE PHENIX INSURANCE COMPANY, Appellant.

Defendant insured plaintiff's canal boat for one year from August 2, 1886, against perils of "rivers, canals and fires," excepting losses "arising from want of ordinary care and skill in loading and stowing cargo, * * * inherent defects and other unseaworthiness," and from "gangways * * * being improperly secured and protected." The policy authorized the carrying of lime in barrels. In May, 1887, the boat was loaded with quick-lime in barrels at a point on the Hudson river. Between three and four hours after the loading was completed, the hold of the boat was discovered to be on fire through the slacking of the lime; it was towed out into the river and sunk. This, it was conceded, was the only way to prevent total destruction of the boat by fire. In an action to recover the insurance, plaintiffs' evidence was to the effect that the lime was not wet while it was being transferred to the boat, and that the hatches were carefully closed; also that the boat was thoroughly repaired late in the summer before the loss. The boat was tested after it was discovered to be on fire and but one inch of water was found in the hold. There was no evidence as to the condition of the lime when it was delivered to the boat. No defects in the boat, or any unseaworthiness were shown; defendant, however, claimed that these were to be inferred from the slacking of the lime, which, if the lime was dry when loaded, must have been caused by water entering through a leak in the boat. The plaintiffs were nonsuited. *Held*, error; that the evidence did not justify a finding that the slacking was caused by a leak of sufficient size to make the boat unseaworthy; that some of it may have been wet before loading sufficiently to have caused it to slack.

Van Wickle v. Mechanics & Tr. Ins. Co. (16 J. & S. 95; 97 N. Y. 350); *Berwind v. Greenwich Ins. Co.* (114 id. 231), distinguished.

Also *held*, that the loss was by fire, within the meaning of the policy.

It seems that it is not necessary to show actual ignition, or combustion to establish a loss by fire.

It appeared that the day after the fire, defendant's agent, who issued the policy, was notified of the loss and examined the wreck; he received a verified statement of the circumstances of the loss, which, with a full statement of his own as to the condition, he mailed to defendant, by whom they were retained. Defendant's adjuster thereafter wrote to the agent that he had examined the boat and would "pick her up," i. e., raise her. Plaintiffs verified formal proofs of loss and executed an assignment of all their interest in the boat to defendant, which was delivered to and retained by the agent. *Held*, that, a finding by the trial court,

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as matter of law, that the boat had not been abandoned by the plaintiffs, and that an abandonment had not been accepted by defendant, was error.

(Argued March 8, 1892; decided April 19, 1892.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made June 7, 1890, which reversed a judgment in favor of defendant entered upon an order which dismissed the complaint.

August 2, 1886, the defendant insured the canal boat "Mary V. Keenan," for one year from that date under a uniform canal hull policy, valued for \$1,200, against the "perils * * * of the inland lakes, rivers, canals, and fires that shall come to the damage of the said vessel, or any part thereof. Excepting all perils, losses, * * * arising from want of ordinary care and skill in loading and stowing the cargo of said vessel; from rottenness, inherent defects and other unseaworthiness; from gangways and openings through the deck or sides being improperly secured and protected."

The policy contained the privilege to carry lime in barrels. At about eight o'clock A. M., on Friday, May 6, 1887, the captain of the boat and his son (who constituted the crew), began loading it with quick-lime in barrels at Green Island, which is on the Hudson river and about six miles north of Albany. During the day the hold of the vessel (except the forward hatch) was filled, the hatches closed and one car-load placed on deck. On the next day at about four o'clock in the afternoon the boat was completely loaded. Nearly twenty-one hundred barrels were taken on board, about nine hundred being on deck. After the loading was completed the boat was towed to Albany, where it arrived about six o'clock in the afternoon of Saturday, and was placed in a tow to go down the river. Between seven and eight o'clock of the same evening the captain discovered smoke issuing from the hold in the boat, and on examination it was found that the lime was slacking and had engendered so much heat that the deck was

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hot, the pitch boiling out of its seams and crackling sounds were heard in the hold. The boat was immediately towed to a wharf near by and the lime on deck was hurriedly unloaded. The boat was then towed a short distance down the river and sunk in water about seventeen feet deep in order to prevent a total loss by fire. It is conceded that there was no other way to prevent the total destruction of the boat by fire, for the hot slacking lime could not be removed and the use of water in the open air would have accelerated chemical action instead of stopping or retarding it. The fire was extinguished when the boat was sunk.

This action was brought November 1, 1887, to recover the sum for which the boat was insured. The defendant answered that the loss did not occur from any of the perils insured against, and that the lime was loaded in a rain storm and became saturated with water, which caused the lime to slack and started the fire. No witnesses were sworn in behalf of the defendant and at the close of the plaintiffs' evidence they were nonsuited, upon which a judgment was entered, and which was reversed by the General Term.

Richard L. Hand for appellant. No loss occurred by reason of any peril insured against. (*Pitcher v. Hennessy*, 48 N. Y. 419; 2 Pars. on Mar. Ins. 231, 518; *Crofts v. Marshall*, 7 C. & P. 597; *Barnewall v. Church*, 1 Caines, 217; 2 Am. Dec. 180, note; *Talcott v. C. Ins. Co.*, 2 Johns. 127; *Briggs v. N. A., etc., Ins. Co.*, 53 N. Y. 446; *Babcock v. M., etc., Ins. Co.*, 6 Barb. 637; *Austin v. Drew*, 4 Camp. 360; 1 Wood on Ins. 236; *Berwind v. G. Ins. Co.*, 114 N. Y. 231; *Boyd v. DuBois*, 3 Camp. 133.) The legal presumption is that the boat was unseaworthy, and the casualty resulted from such unseaworthiness. (*Van Wickle v. M. Ins. Co.*, 97 N. Y. 350; *Berwind v. G. Ins. Co.*, 114 id. 231; *Allison v. C. E. Ins. Co.*, 57 id. 87; *Draper v. C. Ins. Co.*, 21 id. 378; *Talcott v. C. Ins. Co.*, 2 Johns. 127; *Morris v. Louisville Underwriters*, 14 Fed. Rep. 226; *Garside v. O. B. Ins. Co.*, 62 Mo. 322; *Walsh v. W. Ins. Co.*, 32 N. Y. 427; *Rogers v.*

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S. M. Co., 14 J. & S. 65.) No loss was proved, and there was no evidence giving any measure of damages. (*Murray v. Hatch*, 6 Mass. 465; *Peck v. M. Ins. Co.*, 3 Mason, 27; *P., etc., Ins. Co. v. Ledue*, L. R. [6 P. C.] 224.) There was nothing for the jury. The nonsuit was proper. (*Ayres v. Hammondsport*, 29 N. E. Rep. 265; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 N. Y. 615; *Kaveny v. City of Troy*, 108 id. 571; *Taylor v. City of Yonkers*, 105 id. 202; *Searles v. M. R. Co.*, 101 id. 661; Phillips on Ins. chap. 17, § 14; *Schuyler v. P. Ins. Co.*, 50 Hun, 493.)

L. M. Brown for respondents. The evidence was abundantly sufficient to warrant a finding that the loss was caused by one of the perils insured against, and that the defendant never had any defense to the claim. (*Gates v. M. C. M. Ins. Co.*, 5 N. Y. 469, 478; *Waters v. M., etc., Ins. Co.*, 11 Pet. 213; *Wood on Ins.* 217; *Matthews v. H. Ins. Co.*, 11 N. Y. 9; *C. F. Ins. Co. v. Corlies*, 21 Wend. 367; *White v. R. F. Ins. Co.*, 57 Me. 91; *N. Y., etc., E. Co. v. T. & M. Ins. Co.*, 132 Mass. 377; *Snowden v. Guion*, 101 N. Y. 458; *Scripture v. L. M. F. Ins. Co.*, 10 Cush. 356; *Ins. Co. v. T. Co.*, 12 Wall. 194; *Berwind v. G. Ins. Co.*, 114 N. Y. 231; *Van Wickle v. M. & T. Ins. Co.*, 97 id. 350; *Palmer v. G. W. Ins. Co.*, 116 id. 599; *Wallerstein v. C. Ins. Co.*, 44 id. 204; Code Civ. Pro. § 533; *Rehberg v. Mayor, etc.*, 91 N. Y. 141.) The evidence was abundantly sufficient to authorize a finding that the defendant company had waived all defenses to the plaintiffs' claim, and estopped itself from denying liability. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 410; *Roby v. A. C. Ins. Co.*, 120 id. 510; *Brink v. H. F. Ins. Co.*, 80 id. 108, 113; *Prentice v. K. L. Ins. Co.*, 77 id. 483, 488; *Goodwin v. M. M. L. Ins. Co.*, 73 id. 480; *Chamberlain v. M. Ins. Co.*, 3 N. Y. Supp. 701.) The trial court was fully justified in holding that the evidence was sufficient to authorize the jury to find that Mr. Little had authority to represent the defendant in matters occurring after loss. (*Van Allen v. F. J. S. Ins. Co.*, 72 N. Y. 604; *Benninghoff v. A. Ins. Co.*, 93 id. 495,

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503; *Wyman v. P. M. L. Ins. Co.*, 6 N. Y. Supp. 289; *Davis v. L. Ins. Co.*, 18 Hun, 230; *McCabe v. D. U. M. Ins. Co.*, 14 id. 599.)

FOLLETT, Ch. J. The plaintiffs do not assert that the loss was occasioned by any of the perils insured against except fire. The defendant insists that the fire was caused by some part of the lime being put on board during a rain storm, and that the defendant is exempt from liability under the clause which provides that it shall not be liable in case the loss arises "from want of ordinary care and skill in loading and stowing the cargo of said vessel."

The captain of the boat and his son, who placed the cargo on board, testified that the lime was not wet while it was being transferred from the cars to the boat, that the hatches were carefully closed and the barrels on deck were well protected by canvas. No evidence was given which tended to contradict the positive testimony of the captain and his son. Under this state of the proof, the Circuit Court could not properly nonsuit the plaintiffs on the ground that the boat was improperly laden. It is also insisted by the defendant that if the lime was dry and in good order when taken on board, it must have been wet by means of a leak while the boat was on its trip from Green Island to Albany, and that, therefore, the boat must have been unseaworthy, as no storm was encountered and no accident happened during the trip. The undisputed testimony shows that the boat was built in 1880 or 1881, had been kept in good repair and was thoroughly overhauled and repaired late in the summer before the loss. No witness testified to the existence of defects in the boat, and there is no evidence of unseaworthiness unless, as the defendant contends, they are inferrible from the slacking of the line. In support of the defendant's contention, we are referred to *Van Wickle v. Mechanics & Tr. Ins. Co.* (16 J. & S. 95; aff. 97 N. Y. 350) and to *Berwind v. Greenwich Ins. Co.* (114 id. 231). In both of these cases it was held at Circuit that the boats were unseaworthy when they left their ports. The reports of *Van*

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Wickle's case do not agree as to the circumstances attending the loss. The Superior Court said that the boat sank at its dock after a voyage occupying about forty-eight hours, in fine weather and on a smooth sea, having encountered no sea peril.

In the Court of Appeals it was said that within twenty-four hours after the boat began its voyage, it was found abandoned by its master, soon went down, and that it had not encountered any sea peril on the voyage. In *Berwind's* case the boat was being towed from South Amboy, N. J., to New York city, and when a few hours out it sank in a smooth sea, without having met with any accident or sea peril. In both cases the plaintiffs failed to show that the loss was caused by any peril insured against. Those boats were lost by leaks large enough to sink them in a smooth sea, and in fine weather a few hours after leaving port. In both cases it was well held that it was shown that they were unseaworthy when the voyages began. But in the case at bar, there is no evidence that the slacking of the lime was caused by a leak in the boat of sufficient size to cause it to be unseaworthy, or that it was caused by any leak.

When the boat was tested after it was discovered to be on fire, but one inch of water was found. No attempt was made to show what care the lime had received before it was delivered from the cars, and some of it may have been sufficiently wet to cause it to begin to slack before it was loaded. We do not think the evidence justified the Circuit in holding that the slacking was caused by a leak of sufficient size to make the boat unseaworthy.

Was there a fire on board the boat which caused its loss? In *N. Y. & B. D. Express Co. v. Traders' & M. Ins. Co.* (132 Mass. 377), there was an insurance against loss by fire on goods which were being transported by a steamboat which came in collision with another boat, causing a fire; the boat was sunk before the goods insured were injured by fire, and this was held to be a loss covered by the policy. In *City Fire Ins. Co. v. Corlies* (21 Wend. 367), there was an insurance on goods against loss by fire. The building in which they were kept

was by the direction of the city authorities blown up to prevent the spread of a conflagration. It was found as a fact that the building would have been burned had it not been destroyed; the goods insured were destroyed by the explosion, and it was held that the insurer was liable for the loss.

In the case at bar it clearly appears that the boat would have been destroyed by fire had it not been sunk. After it was sunk it was found that the sides of the boat looked as wood does after it has been "afire, kind of black, charred like, and the barrels all swelled up." A witness who examined the boat about the middle of June with Mr. Owen the defendant's agent, testified: "At the time Mr. Owen and I looked into the boat we found pieces of barrel like, and found several pieces of heads of barrels that were burned into charcoal like." This evidence which was uncontradicted, clearly shows that ignition or combustion had begun before the boat was sunk. This taken in connection with the evidences of fire which were discovered before the boat was sunk, the smoke issuing from the hold, with the deck so hot that the pitch oozed from its seams, makes it reasonably certain that a fire had broken out in the vessel before it was sunk, and which was the proximate cause of the loss. As was well said in *Scripture v. Lowell Mutual F. Ins. Co.* (64 Mass. 356-359), "It may well happen that serious damage within the scope of a fire policy shall be done to a building or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantel-pieces and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition; that is, visible inflammation."

In this case the charred wood renders it reasonably certain that there was actual burning by flame, or at least it was not so certain that there was no fire that the Circuit was authorized to so decide as a matter of law. (May Ins. § 402.) The Circuit clearly erred in holding that the evidence of burning was insufficient to justify the submission of the question to the jury.

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Was the evidence sufficient to warrant the jury in finding that the plaintiffs abandoned the boat as a total loss and that the defendant accepted of the abandonment.

On May 9, 1887, the day but one after the loss, Mr. Little, the agent who issued the policy, was notified of the accident and on the same day examined the wreck. May tenth, the captain of the boat verified a statement of the circumstances of the loss and gave it to the defendant's agent, who May eleventh, mailed it, with a full statement of his own of the condition of the wreck, to the defendant. These statements were received on the next day and were retained. In June Mr. Little received a letter from Mr. Owen, defendant's adjuster, in which he stated that he had examined the wreck, and that he would return to Albany in a few days and "pick her up;" the information contained in this letter was communicated to plaintiffs. The term "pick her up" was testified by the witnesses to mean, to raise the boat. July 11, 1887, the plaintiffs verified formal proofs of loss and executed an assignment to the defendant of all of their interest in the boat which were delivered to and retained by the insurer. September 5, 1887, the captain, at the defendant's request, verified and delivered to it a further detailed statement of the loss. There is no evidence that the defendant did not authorize Little to act as its agent in this matter, but on the contrary it appears that they paid the expenses which he incurred in the examination of the wreck. Under this state of the proofs it was error for the Circuit to hold, as a matter of law, that the boat had not been abandoned by the plaintiffs, and that the defendant had not accepted of the abandonment.

The order should be affirmed and judgment absolute rendered against the appellant with costs.

All concur, except LANDON, J., not sitting.

Order affirmed and judgment accordingly.

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MARIA L. DALY, Respondent, v. JOHN S. WISE, Appellant.

Where a lease of the whole of an unfurnished dwelling for a definite term contains no covenant on the part of the lessor that the premises are in good condition, or that he will put or keep them so, a covenant may not be implied that the dwelling is without inherent defects, rendering it unfit for a residence.

It seems, however, where the lessor, knowing at the time of the execution of the lease of the existence of secret defects or conditions rendering the building unfit for a residence, fraudulently represents to the lessee that they do not exist, or fraudulently conceals their existence, if the lessee abandons the house because thereof, he will not be liable for rent subsequently accruing.

It seems, also, that in case a party for the purpose of inducing another to contract with him, states that a material fact does or does not exist, without having knowledge of the truth of the statement and without having reasonable grounds for believing it to be true, he is liable in fraud, if the statement is relied on and is subsequently found to be false, although he had no actual knowledge of its untruth.

A lessee occupying under such a lease abandoned the premises because of their unsanitary condition, resulting from defective plumbing. In an action to recover rent thereafter accruing, the defendant testified that plaintiff's agent represented that the plumbing was all in good condition; that it had been fixed as they thought it ought to be. It was not shown that plaintiff or the agent knew this statement to be false, or that it was made without actual or supposed knowledge, or that it was made in bad faith, or that the plumbing had not been fixed as stated. *Held*, that a verdict in defendant's favor was justified.

(Argued March 9, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made November 13, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

September 27, 1888, the litigants entered into a written lease by which the plaintiff let to the defendant an unfurnished dwelling, known as 334 West Fifty-eighth street, in the city

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of New York, for one year from October 15, 1888, for \$1,800, payable \$150 October 15, 1888, and a like sum on the fifteenth day of each succeeding month. The lease contained no covenant in respect to the then condition of the house, nor that the lessor should put or keep it in repair. November 15, 1888, the defendant began to occupy the premises, paid the rent for four months, until January 15, 1889, and continued in occupation until February 2, 1889, when he abandoned them because of their unsanitary condition arising from defective plumbing. February 4, 1890, this action was begun to recover the sums due by the terms of the lease on the 15th days of February, March, April and May, 1889 — six hundred dollars in all — with interest. The defendant answered that he was induced to enter into the lease by the oral representation of the plaintiff's agent: "That the building on said premises was properly constructed and in thorough repair, the more especially in the matter of plumbing and sanitary arrangements, and that this defendant signed said lease, relying upon the faith of said representation so made as aforesaid." It was also alleged: "That when defendant entered into possession of said premises it was discovered that said representations were untrue, and that said premises were unfit for the purposes of a residence, in that there existed hidden defects in the plumbing and construction of the sewer and other pipes, and the sanitarian arrangements in the buildings thereon. That such defects were concealed from view and were not discovered until the effect thereof became apparent in the health of the defendant's family. That by reason of said defects the said building became charged with sewer gas and other foul and poisonous odors, thereby causing the defendant, his wife, children and servants to become sick and in great danger of death, and they so continued sick and in danger until the defendant was evicted from said premises, as herein-after set out."

At the close of the evidence neither party asked to have any question of fact submitted to the jury, but each moved that a verdict be directed in his or her favor. The defendant's

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motion was refused and he excepted, but the plaintiff's motion was granted and the defendant again excepted. No other exceptions are contained in the record, and the only questions reviewable in this court are those presented by the two exceptions mentioned. A judgment was entered on the verdict for the plaintiff, which was affirmed at General Term. No opinion was written, but the case was decided upon the opinion of the same court (15 Daly, 431), in another action arising over the same lease.

John S. Wise for appellant. The false representation by the plaintiff's agent that the plumbing was in good repair was fraudulent. (*Smith v. Marrable*, 11 M. & W. 5; *Rhinelander v. Seaman*, 13 Abb. [N. C.] 455; *Wallace v. Lent*, 1 Daly, 481; *Hawkins v. Palmer*, 57 N. Y. 664; *Hammond v. Pennock*, 61 id. 145; *Jallife v. Hite*, 1 Call. 307.) The false representation being upon a material point, vitiated the lease. (McAdam on Landl. & Ten. 120.) Even if the representation of the agent be held not to be fraudulent, and even in the absence of a covenant to repair in the lease, there was a constructive eviction of the defendant. (*Tallman v. Murphy*, 120 N. Y. 345; *Thomas v. Nelson*, 69 id. 118; *Bradley v. DeGorcannia*, 12 Daly, 393; *Lawrence v. Burdill*, 17 Abb. [N. C.] 312.)

Robert Sturges for respondent. Under the common law, the landlord was not bound, in the absence of an express covenant in the lease, to make repairs. (*McGlashan v. Tallmadge*, 37 Barb. 313; *Franklin v. Brown*, 118 N. Y. 110; *Witty v. Matthews*, 52 id. 512; *Edwards v. McLean*, 122 id. 302; *Mayer v. Moller*, 1 Hill, 491; *Franklin v. Brown*, 118 N. Y. 110.) In the absence of an express covenant, the tenant is without remedy, even if the demised premises are unfit for occupation. It is no defense to an action for the rent that the premises were and continued to be unhealthy, noisome and offensive, and unsuitable for a dwelling. (*McGlashan v. Tallmadge*, 37 Barb. 313; *Moffatt v. Smith*, 4 N. Y. 126;

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Franklin v. Brown, 118 id. 110; *Edwards v. McLean*, 122 id. 302; *Howard v. Doolittle*, 3 Duer, 464; *Chadwick v. Woodward*, 13 Abb. [N. C.] 441; *Coulson v. Whiting*, 12 Daly, 413; *Seffrey v. Harteau*, 56 N. Y. 398; *Fowler v. Stevens*, 8 J. & S. 479.) The statute (Chap. 345, Laws of 1860) has not affected the common-law rule requiring the tenant to make ordinary repairs. (*Sheary v. Adams*, 18 Hun, 181; *Suydam v. Jackson*, 54 N. Y. 450; *Coulson v. Whiting*, 12 Daly, 408; *Sutphen v. Seebas*, 12 id. 139; *Edwards v. McLean*, 122 N. Y. 302; *Chadwick v. Woodward*, 13 Abb. [N. C.] 441.) There is no proof in this case that the illness complained of in defendant's family was caused by sewer gas or any other definite cause. (*Reeves v. Hyde*, 11 N. Y. S. R. 681.) The defendant cannot claim to be relieved from payment of rent under the covenant of quiet enjoyment. (McAdam on Landl. & Ten. [2d ed.] 481; *Edgerton v. Page*, 20 N. Y. 281; *Howard v. Doolittle*, 3 Duer, 464.) The responsibility of making an examination as to the existence of defects in the premises, and of providing against their ill effects, must rest upon the person who intends hiring before the execution of the lease. (*Franklin v. Brown*, 118 N. Y. 110.)

FOLLETT, Ch. J. In case neither party requests to have any question of fact submitted to the jury, but each asks that a verdict be directed in his favor, the court is authorized to determine the fact in issue, and upon appeal the disputed facts are deemed to have been determined in favor of the party for whom the verdict is directed. (*Kirtz v. Peck*, 113 N. Y. 222; *Dillon v. Cockcroft*, 90 id. 649; *Provost v. McEncroe*, 102 id. 650.) This case must be determined upon the theory that all the disputed facts have been found in favor of the plaintiff.

In case the whole of an unfurnished dwelling is leased for a definite term, under a single contract which contains no covenant that the premises are in good repair, or that the lessor will put or keep them so, the law does not imply a covenant

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on the part of the lessor that the dwelling is without inherent defects rendering it unfit for a residence. (*Franklin v. Brown*, 118 N. Y. 110.) In *Smith v. Marrable* (11 M. & W. 5) a contrary rule was laid down by Baron PARKE. That case arose out of a contract to let a furnished dwelling for six weeks at eight guineas per week. The tenant moved in, but found the house so infested with bugs that it was uninhabitable, and at the end of the first week, left, paying the rent for that week. In an action brought to recover rent, it was held in the opinion delivered by Baron PARKE, concurred in by Barons ALDERSON and GURNEY: "That if the demised premises are encumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up. This is not the case of a contract on the part of the landlord that the premises were free from this nuisance; it rather rests in an implied condition of law, that he undertakes to let them in a habitable state."

Chief Baron ABINGER concurred upon the ground that: "A man who lets a ready furnished house surely does so under the implied condition or obligation, call it which you will, that the house is in a fit state to be inhabited." The opinion of Baron PARKE was rested on the authority of *Edwards v. Etherington* (Ry. & M. 268); *S. C.* (7 D. & R. 117) and *Collins v. Barrow* (1 M. & Rob. 112), both of which cases together with *Salisbury v. Marshal* (4 C. & P. 65) were expressly overruled by *Hart v. Windsor* (12 M. & W. 68), in which PARKE said: "We are under no necessity of deciding in the present case, whether that of *Smith v. Marrable* be law or not. It is distinguishable from the present case on the ground on which it was put by Lord ABINGER, both on the argument of the case itself, but more fully in that of *Sutton v. Temple* (12 M. & W. 52), for it was the case of a demise of a ready furnished house for a temporary residence at a watering place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on which I rested my judgment."

Smith v. Marrable was decided at Hilary Term, 1843, and

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Hart v. Windsor and *Sutton v. Temple*, at Michaelmas Term of the same year. The rule laid down in *Smith v. Marrable* by ABINGER, B., as applicable to furnished houses, has been followed in *Campbell v. Lord Wenlock* (4 F. & F. 716) and *Wilson v. Hatton* (L. R. [2 Exch. Div.] 336), but the rule as stated by PARKE, B., has not been followed in England or in this state. (*Franklin v. Brown*, 118 N. Y. 110.) The defendant cannot escape liability for rent on the ground that the law implied a covenant that the dwelling was fit for habitation.

Is the evidence contained in the record sufficient to have required the trial court to have held, as a matter of law, that the plaintiff fraudulently represented that the dwelling and its fixtures were in good condition, or that she fraudulently concealed from the plaintiff the fact that it was in an unsanitary condition?

In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent. (*Wallace v. Lent*, 1 Daly, 481; *Jackson v. Odell*, 12 id. 345; *Rheinlander v. Seaman*, 13 Abb. [N. C.] 455; *Cesar v. Kurutz*, 60 N. Y. 229.) In the case at bar the defendant testified, and in this he was not contradicted, that when he first went to the house with the plaintiff's agent he said: "I complained to him (the agent) at the time, that I thought some of the plumbing looked old. He said that Mrs. Daly was very stiff, determined not to put in any new, that it was all in good condition, that they had fixed it as they thought it ought to be." This is the only representation which was made by the plaintiff, or her agent in respect to the sanitary condition of the dwelling. It was not shown that the plaintiff or her agent knew that the representations were false, or that the plumbing was out of order, and fraudulently concealed the fact. This takes the case out of the rule above referred to in respect to the owner's liability in case he fraudulently misrep-

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resents the condition of the dwelling or knowing that it is in bad condition fraudulently conceals the fact from the person who becomes the lessee.

Is the defendant liable for having stated that a material fact existed which did not exist, *i. e.*, that the plumbing was in good order, upon the theory that she was bound to know whether or not the statement was true.

In case a party, for the purpose of inducing another to contract with him states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, is liable in fraud, if the statement is relied on and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. (*Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 id. 562; *Oberlander v. Spiess*, 45 id. 175; *Wakeman v. Dalley*, 51 id. 27; 2 Pom. Eq. Juris. §§ 887, 888; Story's Eq. Juris. § 193.)

It does not appear that the plumbing had not been fixed as stated, nor that the statement that "it was all in good condition," was made without actual or supposed knowledge of its condition, nor that it was made in bad faith, and we think the case does not fall within the principle of the authorities last cited.

The defendant cannot escape liability on the ground that the statement of the agent amounted to a warranty because it is not so pleaded in the answer.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

CHARLOTTE WAINWRIGHT, Respondent, v. WILLIAM G. Low et al., Appellants.

Under the provision of the act of 1874 (Chap. 261, Laws of 1874), amending the act of 1845 (Chap. 115, Laws of 1845), in reference to aliens taking and holding lands in this state, which provides that if an alien resident, or a naturalized or native citizen, "has died or shall hereafter die" holding a conveyance of lands in the state, purchased by such person, and "leaving persons who would answer the description of heirs," such persons, whether citizens or aliens, may take and hold the lands as heirs, etc., the state surrendered its title to lands acquired by escheat previous to the passage of the act, of which it had not before that time assumed in any manner to make disposition, where the person to whose title the state so succeeded, died leaving alien heirs.

By an ante-nuptial agreement, S., in contemplation of the marriage, conveyed to a trustee certain lands, the trustee to pay to her the rents and profits, or at her election to permit her to hold and use the lands during her life, and upon her death to convey them as she by deed, appointment or will, "should order, direct or appoint." S. retained possession of the premises until her death. *Held*, that the ante-nuptial conveyance did not create a trust within the meaning of the Statute of Uses and Trusts (1 R. S. 728, § 55), as the power of the trustee to receive and apply the rents and profits was dependent on the election of S., and she exercised the right reserved by her to herself take and hold the property; that no title vested in the person named as trustee (1 R. S. 727, § 47; *Id.* 728, § 49; *Id.* 729, § 58); and that, therefore, the premises were held and owned by S. at her decease.

S. died in 1871, intestate and without having executed an appointment or deed as prescribed in the ante-nuptial agreement. She left the plaintiff, an alien, her only heir at law. By an act passed in 1876 (Chap. 184, Laws of 1876), the state released its right and interest in the lands to A., the husband of S., with the proviso, however, that nothing therein contained should "affect the right in said real estate of any heir at law." Before the passage of the act of 1874, no proceeding for escheat had been taken by the state. The trustee having died, upon petition of A. a new trustee was appointed by the court, with directions to convey the premises to A., which was done. In an action of ejectment, defendant claimed title under said conveyance to A. *Held*, that upon the passage of said act of 1874, the title vested in plaintiff, which title was not affected by the act of 1876; that, therefore, A. acquired and conveyed no title or interest by his deed; and that judgment was properly directed for plaintiff.

Reported below, 57 Hun, 386.

(Argued March 11, 1892; decided April 19, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This was an action of ejectment, brought to recover certain premises situated in the city of Brooklyn.

The premises were conveyed to Sarah Ann Wood in May, 1846. She was then the widow of one Wood, who died in or about the year 1836. She married George G. Ackley July 8, 1846. And shortly before and in contemplation of such marriage, she entered into an ante-nuptial trust deed, in which Ackley and Edward F. Sanderson joined, whereby, in terms, the premises were conveyed to Sanderson in trust to receive, take and hold the rents, issues and profits, and to pay the same or any portion thereof to her, or to such person or persons as she should require or direct for her sole and separate use, or at her election to suffer and permit her to take, hold, receive and use such real estate for her own separate use and benefit, and upon her decease to convey the premises to such person or persons, and for such uses and purposes as she "by deed of appointment or instrument in the nature of a last will and testament, under hand and seal duly made and executed in the presence of two or more witnesses," should "order, direct or appoint." Mrs. Ackley continued in the possession of the premises, and she and her husband (Ackley) resided there until her death in 1871, and Ackley continued to reside there until his death in August, 1876.

After her death, a deed bearing date July 8, 1847, having her name subscribed to it, but without any attesting witness or certificate of acknowledgment, was found in her bureau drawer, by the terms of which instrument, after reciting something of the ante-nuptial deed before mentioned, she authorized and directed Edward F. Sanderson to convey the premises to George G. Ackley. The referee found that Mrs. Ackley signed her name to this deed of appointment, but that she didn't do so with the intent to execute and give legal effect to it, and she did not during her life deliver such instrument to

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Ackley or Sanderson, or to any other person; but that she retained such paper in her possession to the time of her death. Sanderson died in 1866. In April, 1876, the legislature passed "An Act to release the right, title and interest of the People of the State of New York to George G. Ackley, husband of Sarah Ann Ackley, deceased, in certain real estate situate in the city of Brooklyn, and also in the town of Flatbush in the county of Kings and state of New York." The land in question was included in that mentioned in the act; and by the second section it was provided that "Nothing in this act contained shall be so construed as to affect the right in said real estate of any heir at law." In May, 1876, Ackley, by his petition to the Supreme Court, sought the appointment of a trustee in place of Sanderson, deceased, and direction to him to convey the premises to the petitioner; and such proceedings were thereupon had that David Barnett was appointed such trustee and directed to make such conveyance. The direction was executed. And in July, 1876, Ackley and his wife Margaret Ackley conveyed the premises to one Hunting, who immediately reconveyed them to Mrs. Ackley. She conveyed to one Sayres in February, 1882, and he reconveyed to her in April, 1885. In April, 1885, she conveyed to defendant Low, under whom the other defendant occupied the premises. Mrs. Sarah Ann Ackley died intestate in 1871. The plaintiff, her sister and her only heir at law, was born in England and has never resided in or become a citizen of the United States, but is a subject of the crown of Great Britain. The intestate was also a native of England. Her first husband, Wood, was, at the time of their marriage, a citizen of the United States.

The referee directed judgment for the plaintiff.

Further facts are stated in the opinion.

William G. Low for appellants. The deed of appointment was valid, though not acknowledged. (*Strough v. Wilder*, 119 N. Y. 530; 86 id. 603, 608; 3 Kern. 509; *Richardson v. Pulver*, 63 Barb. 71; 4 Kent's Comm. 333; *Clark v. Crego*,

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47 Barb. 600; *In re Robinson*, 37 N. Y. 261; *Milbank v. Crain*, 25 How. Pr. 193; *In re Waring*, 99 N. Y. 114.) Assuming that Mrs. Ackley died without having executed a deed of appointment, the property passed to her heirs, if she had any capable of inheriting. (2 R. S. 729, 748, §§ 60-68, 81, 82, 83; *Luhre v. Eimer*, 80 N. Y. 176; *McCanghal v. Ryan*, 27 Barb. 376; *Ettenheimer v. Haffernan*, 66 id. 374; *Hanenheim v. Lynham*, 100 U. S. 483; Laws of 1876, chap. 184.) Lands held in trust, if not devised by *cestui que trust*, descend to his heirs. (1 R. S. 574; Gerard on Tit. 365.)

S. R. Ten Eyck for respondent. The findings of facts made by the referee are conclusive upon this court, for they are all based upon conflicting or undisputed evidence. (Code Civ. Pro. §§ 992, 993, 1337; *Halpin v. P. Ins. Co.*, 118 N. Y. 171; *Flack v. Vil. of Green Island*, 2 N. E. Rep. 267; *Vandervoort v. Gould*, 36 N. Y. 639; *Wood v. Wood*, 83 id. 575.) The trust attempted to be created by the ante-nuptial deed executed by Mrs. Ackley was void, and the title to the premises remained in her notwithstanding its execution. (*D. D. Co. v. Stillman*, 30 N. Y. 194; *In re Livingston*, 34 id. 568; *Albrecht v. Pell*, 11 Hun, 127; *Herman v. Roberts*, 64 N. Y. 333; *Miller v. Wright*, 12 Cent. Rep. 212; *Nichols v. Walworth*, 4 Den. 385; *Watkins v. Reynolds*, 25 N. E. Rep. 322.) If a valid power in trust was created by the ante-nuptial trust deed executed by Mrs. Ackley, it did not divest her of her title to the premises. The title remained in her subject to the execution of the power. (*In re Livingston*, 34 N. Y. 568; *Allen v. De Witt*, 3 id. 278; *Barber v. Cary*, 1 Kernan, 397; *A. F. Ins. Co. v. Bay*, 4 N. Y. 9.) The proceedings instituted by George G. Ackley, in the Supreme Court, in May, 1876, by which he obtained a conveyance of the premises, were fraudulently instituted and carried on by him; and the conveyance that he thereby obtained was void, and gave him no title to the premises. (*In re Waring*, 99 N. Y. 116; *Albrecht v. Pell*, 11 Hun, 127; Freem. on Judg. §§ 162-201; *Campbell v. Hall*, 16 N. Y. 575; *Sheridan v. Andrews*, 49

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id. 483; *Zoeller v. Riley*, 100 id. 107; *Denman v. McGuire*, 101 id. 161; *N. Bank v. Hubbill*, 117 id. 399.) Mrs. Ackley having died intestate seized of the premises, they descended to her heirs, if she left any capable of inheriting them. They escheated to the state, but in 1874 the legislature passed an act which removed the plaintiff's disability and placed her on an equality with citizens in that respect. (Laws of 1874, chap. 261; *Luhrs v. Eimer*, 86 N. Y. 171; *Hall v. Hall*, 13 Hun, 306; *Brown v. Sprague*, 5 Den. 551; *Maynard v. Maynard*, 36 Hun, 227; *White v. City of Brooklyn*, 122 N. Y. 53; *Branagh v. Smith*, 46 Fed. Rep. 517.)

BRADLEY, J. The plaintiff's right to recover is dependent upon her having the legal title to the land in question. Prior to her marriage to Wood, Sarah Ann was an alien, but by her marriage to Wood, who was a citizen, she became a naturalized citizen of the United States. (*Luhrs v. Eimer*, 80 N. Y. 171.)

At the time of her death in 1871, her sister, the plaintiff, her only heir at law, being an alien was incapable of inheriting the land. (L. 1845, ch. 115.) And assuming that Mrs. Ackley in her life-time made no provision for the disposition of the property, it escheated to the state. The plaintiff had no support for her claim to the premises prior to the passage of the act of 1874 (Ch. 261), so amending section four of chapter 115, L. 1845, as to provide that "if any alien, resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate, within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state would answer the description of heirs of such deceased person, such persons so answering the description of heirs of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold as heirs of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased

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alien or citizen at the time of his decease." This statute as well as L. 1875 (Ch. 38) by its terms includes within its effect the heirs of those who had died before as well as after its passage and without distinction between citizens and aliens otherwise than in relation to alien males of full age, who are required to make and file in the office of the Secretary of State the deposition or affirmation required by 1 R. S. 720, § 15. And although the land had escheated to the state when the act of 1874 was passed, the legislative purpose is by its provisions quite apparent to surrender the title to lands taken by escheat, and of which the state had not before that time assumed in any manner to make disposition. (*Luhrs v. Eimer*, 80 N. Y. 171; *Hall v. Hall*, 81 id. 130.) In that view there was nothing in the escheat to prevent the plaintiff from effectually asserting her claim to the land after the passage of that act, as no proceedings for any purpose had been taken on the part of the state prior to that time founded upon the title taken in that manner on the death of Mrs. Ackley. And, therefore, at the time of the passage of the act of 1876 (Ch. 184), no title was in the state and the act was ineffectual to vest any title in Mr. Ackley. And it may be observed that by its provisions the rights of heirs were expressly saved from its operation. (*Maynard v. Maynard*, 36 Hun, 227.) It is urged that there is nothing in the act to operate as a grant of the title to the plaintiff, and in support of the view that it was not within its purpose to divest the state of the title, reference is made to section eleven of the act of 1845, which provided that it should "not affect the rights of the state in any case in which proceedings for escheat have been, or shall before the making and filing the deposition or affirmation in the first section of this act mentioned be, commenced or the rights of any person or persons whose interests may have become vested in any such lands or real estate." As before remarked no proceedings for escheat had been taken when the act of 1874 took effect, nor had any person acquired any rights founded upon any interest which had become vested in him. And in view of the provisions of the fourth section as amended in 1874 and

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as further amended in 1875 (Ch. 38), no express grant to the plaintiff was essential to vest the title in the plaintiff as heir at law of Mrs. Ackley assuming that the real estate was owned by the latter at the time of her death.

It is contended that by reason of the ante-nuptial trust deed made by her to Edward F. Sanderson in 1846, she had no title thereafter prior to the time of her decease. This would be so if the deed created a trust within the meaning of the statute (1 R. S. 728, § 55), because on the death of the trustee the trust would have become vested in the Supreme Court to be executed by some person appointed by it for that purpose. (1 R. S. 730, § 69). But while the trust deed contained a provision for the receipt by the trustee of the rents and profits and the application of them to the use of the grantor during her life, such power was made dependent on her election to permit him to do so; and she reserved the right which she exercised, of taking and holding the property for her own use and benefit. It would, therefore, seem that the trustee acquired no right by the instrument to take possession and control of it and receive and apply the rents and profits in the sense requisite to a trust having the support for its execution of title in the trustee. The grantor was the sole beneficiary having by the terms of the deed, the right to the actual possession and use of the premises; and, therefore, no title vested in the trustee. (1 R. S. 727, § 47; *Id.* 728, § 49; *Id.* 729, § 58.)

If the trust had been within the fifty-fifth section of the statute it terminated with the death of Mrs. Ackley, and in that case the real estate, unless other disposition of it was legitimately directed by her, would have descended to her heirs, if she had any capable of taking it. (1 R. S. 754, § 21; *Watkins v. Reynolds*, 123 N. Y. 211.) In the view taken it is unnecessary to consider the question whether in that event the real estate would, within the meaning of the provisions of the acts of 1874 and 1875, have been deemed owned and held by her at the time of her decease. The provision of the trust deed for the execution by the trustee of such power of appointment as the grantor should create by deed or will duly made

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and executed under her hand and seal in the presence of two witnesses, it is insisted on the part of the defendant was made effectual by a deed of appointment made by her, and that through its execution by a trustee appointed after her death the defendant's title to the premises is supported. The new trustee then appointed pursuant to the direction of the court assumed to convey the land to Mr. Ackley in execution of what was treated as a deed of appointment made by his wife and bearing date in 1847. The plaintiff had no notice of the proceedings, which were taken in 1876, for the appointment of a new trustee; and it was represented by the petitioner, Ackley, in the proceeding that Mrs. Ackley left no heir at law; and that the deed of appointment had been in his possession from the time of its execution by her, which he also verified.

The execution of this deed of appointment was neither attested by any witness or acknowledged by the person whose name was subscribed to it. And the referee found that Sarah Ann Ackley did not sign the paper with intent thereby to execute it and give it legal effect as a deed of appointment, and that she did not in her life-time deliver it to Mr. Ackley or to Sanderson or to any other person, but retained it in her possession down to the time of her death. This finding of the referee was permitted by the evidence and for the purposes of this review must be deemed conclusive. And as the inference was warranted that she did not at any time during her life intend to give any legal effect to the instrument as one of appointment for execution by the trustee pursuant to the provision of the trust deed in that respect, the retention of it in her possession in the manner it appears she did up to the time of her death, is accounted for. It may be that the referee would have taken a different view of the intent of Mrs. Ackley in that respect, and of the effect of the paper if it had been executed by her in the manner and as provided in the deed of trust. And here it must be assumed that the questions of fact presented by the evidence were properly disposed of in the court below.

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These views lead to the conclusion that Mr. Ackley took no title through the release to him by the legislative act of the state in 1876, or by the deed made to him by the new trustee, who was appointed by the court on the assumption that a valid deed of appointment had been made, without which there was no support for the application to the court for that purpose. But that on the passage of the act of 1874, the plaintiff as heir at law of Mrs. Ackley became vested with the title by descent.

The judgment should be affirmed.

All concur.

Judgment affirmed.

BENJAMIN COLLINS, Appellant, v. LONG ISLAND CITY et al.,
Respondents.

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Under the provision of the act of 1886 (§ 15, chap. 656, Laws of 1886), confirming "with interest thereon allowed by law" unpaid taxes in Long Island City, which were laid or levied prior to 1883, interest was properly chargeable on such taxes.

In an action to set aside certain tax sales of lands in said city for unpaid taxes for the year 1888, it appeared that the lands were unoccupied and were owned by a non-resident. The name of the owner was inserted in the assessment-roll. It was claimed by plaintiff that this rendered the assessment void. *Held*, untenable; that as under the provision of the charter of said city (§ 6, tit. 6, chap. 461, Laws of 1871), giving to the city assessors all the power of town assessors, this exception is made: "That lands of non-residents shall not be separated from other assessments," and as the lands were properly placed in the roll, and every fact stated necessary to make a valid assessment, the insertion of the owner's name was surplusage, which did not affect the validity of the assessment.

It seems that if the statement of the owner's name had the effect to initiate a personal charge against him, his remedy is by proper proceedings to set aside the tax as against him, to restrain its collection, or to recover damages in case it has been enforced.

(Argued March 14, 1892; decided April 19, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, entered upon an order

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made May 12, 1890, which reversed a judgment in favor of plaintiff entered upon the report of a referee and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Ralph Burnett and *Eliphalet Nott Anable* for appellant. The taxes for the years in question were originally invalid and void. (*Van Rensselaer v. Whitbeck*, 7 N. Y. 517; *Brevoort v. City of Brooklyn*, 89 id. 128; *Hillton v. Fonda*, 86 id. 346; *Stewart v. Crysler*, 100 id. 378, 383.) No interest had accrued on the taxes prior to the enactment of chapter 383 of the Laws of 1882 and the act of 1886 (Chap. 656). (Laws of 1871, chap. 461, §§ 6, 7, 12, 13, 14; *Van Rensselaer v. Whitbeck*, 7 N. Y. 517-522; *Westfall v. Preston*, 49 id. 349; *Smith v. Mosher*, 31 N. Y. S. R. 235.) The act of 1882 failed to charge interest on city and ward taxes. (Laws of 1882, chap. 383, § 18.) The act of 1886 wholly fails to charge the taxes for the years during which the rolls were unverified, with interest. (Laws of 1886, chap. 656, §§ 14, 15; *In re Van Antwerp*, 56 N. Y. 261; *Spencer v. Merchant*, 100 id. 585; Laws of 1882, chap. 812; *Heckman v. Pinkney*, 81 N. Y. 211; *People ex rel. v. Brooklyn*, 69 id. 605; *In re N. Y. Institute*, 121 id. 234, 239.) Assuming that the act of 1886 created a new tax, it wholly failed to charge interest upon it in those cases where the original tax was void. (Laws of 1882, chap. 812, § 18; Laws of 1886, chap. 656, § 15.)

George W. Stephens for respondents. The question of interest and the right of the plaintiff to insist upon paying the taxes prior to the year 1883 without interest, has already been determined by this court. (*People ex rel. v. Bleckmann*, 129 N. Y. 637.) Chapter 656 of the Laws of 1886, by its express terms, relieved the interest on the taxes as well as the taxes themselves. (Laws of 1886, chap. 656, § 15; Laws of 1862, chap. 383, § 1.) It was within the power of the legislature in relieving the taxes to also reliev the interest. (*Spencer v.*

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Merchant, 125 U. S. 345; 100 N. Y. 585.) The relevying of a tax makes it a debt due from the time it should have been first levied. (*Harwood v. North Brookfield*, 130 Mass. 561; *Fairfield v. People*, 94 Ill. 244; *Mattengly v. Columbia*, 97 U. S. 687; *Locke v. New Orleans*, 71 id. 172; *Plumber v. M. Co.*, 46 Wis. 602; *Peters v. Myers*, 23 id. 602; *Simmons v. Aldrich*, 41 id. 251.)

BROWN, J. This action was brought to set aside certain tax sales of land in Long Island City and also to ascertain the amount of taxes and water-rates due and unpaid upon several lots of land owned by the plaintiff, and to have the same canceled upon payment of the amount found to be due.

The appeal presents two questions:

1. Is the plaintiff bound to pay interest on the taxes for the years prior to 1883.
2. Is the tax for the year 1883 invalid by reason of a defective assessment.

The first question depends upon the construction to be given to sections 15 and 16 of chapter 656, Laws of 1886, and was determined in *People ex rel. Flower v. Bleckwenn* (55 Hun, 169, affirmed by Court of Appeals December 7, 1891, without opinion).*

In reference to the second question it appeared that in the year 1883 the lands described in the complaint were unoccupied and were owned by Mary F. Norwood, who was a resident of the city of New York, and were assessed in her name.

The claim of the appellant is that the insertion of the name of the owner in the assessment-roll renders the assessment void.

The charter of Long Island City (Ch. 461, L. 1871, title 6, § 6), provides that assessors in preparing assessment-rolls shall have all the powers of assessors of towns in the state, "except that lands of non-residents shall not be separated from the other assessments. And in case of non-payment of county

* 129 N. Y. 637.

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and state taxes all lands on which such taxes remain unpaid shall be returned to and received by the comptroller of the state as lands of non-residents."

It is further provided by chapter 339, Laws of 1880, that no assessment shall be invalid "by reason of any error, mistake or insufficiency in the owner's name as set down in any assessment-roll of said city, or by reason of such owner's name being omitted from such rolls."

We agree with the counsel for the appellant that the law of 1880 has no application to lands of non-residents.

It obviously could have no application to a system of assessment which did not require the statement in the roll of the name of the owner or occupant. Full effect is given to it by limiting it to occupied lands where the purpose of the assessment is ultimately to make the tax a charge against the person assessed, and collect it primarily from the personal estate, and enforce it against the land only in case of its non-payment or non-collection, by levy and sale of personal property.

The charter of the city further gives to the receiver of taxes the same power in the collection of state and county taxes as town collectors possess. (Title VI, § 14.) And it makes provision for the collection of the city taxes by distress and sale of the goods and chattels of the persons against whom the tax is assessed and by the sale of lands under the direction of the common council. (§§ 22 and 23.)

The statutes, relating to the assessment of lands in towns, require the assessors to designate the lands of non-residents in the assessment-roll separate and apart from the other assessments. And assessors have no jurisdiction of the person of a non-resident whereby they can initiate a charge against him personally for a tax, because of unoccupied lands owned by him in their town. They have power to value the lands, but none to value them against the owner. Hence it follows that they have jurisdiction of the land and may subject it to an assessment, and so initiate a lien thereon for a tax ultimately to be laid, but none to charge the owner with its payment, and the land is to be assessed without the name of an owner, and

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set down in the roll apart from the names of the taxable inhabitants. And this requirement of a classification of resident and non-resident lands is imperative. (*Whitney v. Thomas*, 23 N. Y. 281; *Crooke v. Andrews*, 40 id. 547; *Newell v. Wheeler*, 48 id. 486.)

Lands of residents are not, under the first assessment, subjected to the lien of the tax, and it can, by virtue of that assessment, be collected only from the owner. (1 R. S. 463, § 27.)

The tax may ultimately be made a lien on the land and enforced against it, but only by proceedings subsequent to the first assessment. (L. 1855, ch. 427, § 5; *Newman v. Suprs. of Livingston Co.*, 45 N. Y. 676.)

But, under the charter of Long Island City, the requirement of separation does not exist. Lands of residents and non-residents, whether occupied or vacant, are to be placed together in the roll and every tax imposed or laid is a lien on the land, and, if unpaid, all lands may be sold to satisfy the tax.

If lands are owned by a resident of the city, or are occupied, they may be assessed personally to the owner or occupant, and the name of such would appear in the first column of the assessment-roll among the taxable inhabitants and the tax could be enforced against them by distress and sale of their goods and chattels. If the land is vacant and owned by a non-resident of the city, the first column of the roll should state, instead of the name of the owner, such a designation or description of the land as the statute requires. (1 R. S. 390, §§ 7, 12, 13.) In the assessment-roll for the year 1883, it is not disputed that every fact essential to a valid assessment upon the lands in question was stated in the roll, and if the name of the owner had been omitted, the assessment would have been a valid one. The question is, therefore, was it rendered invalid by the insertion of the owner's name.

No reason exists why such should be the result. Every statutory requirement has been followed and the only ground of complaint is the statement of a fact unnecessary to charge

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the land with the tax. Assuming that by the manner of making the assessment the owner was named among the taxable inhabitants of the city, and so was apparently liable to be personally charged with the payment of the tax, which result, being outside of the jurisdiction of the assessors, was void, it by no means follows that the tax was not a lien upon the land. I am not aware that it has ever been decided that when lands are assessed as those of a non-resident, the insertion of the name of the owner in the assessment-roll renders the assessment void. The cases cited by the appellant do not so hold.

Hilton v. Fonda (86 N. Y. 339) was an action against assessors for damages for an illegal assessment, and a levy and sale of goods and chattels to collect the tax.

In that case the lands were assessed as those of a resident, and plaintiff's name was placed among the taxable inhabitants of the town and the tax was collected by a distress and sale of goods and chattels. It was held that the assessors had no jurisdiction over the plaintiff, and none to assess his lands as those of a resident. I do not understand, from the report of that case, that there was an attempt to assess the lands as those of a non-resident, or that they were placed in the part of the roll where such lands were designated.

In *Stewart v. Crysler* (100 N. Y. 378), the assessment appeared in the part of the roll devoted to non-resident lands. The owner was a non-resident and his name was inserted in the roll. But the lands were occupied and the sole jurisdiction of the assessors was to assess them to the resident occupant. There was no jurisdiction to assess them as non-resident lands.

But in this case there was jurisdiction to assess the lands as those of a non-resident. They were placed in their proper place in the roll and every fact stated essential to make a valid assessment.

All else was surplusage, and if the statement of the owner's name had the effect to initiate a personal charge against her, her remedy was ample by proper proceedings to set aside the tax against her, to restrain its collection, or recover damages if it was enforced.

Statement of case.

We are of the opinion that there was a valid assessment of lands of a non-resident, and that the tax laid thereon was a lien upon the land.

The order should be affirmed and judgment absolute rendered against the appellant, with costs.

All concur, except LANDON, J., not sitting.

Order affirmed and judgment accordingly.

ARCHIBALD FARR, Respondent, v. JOHN P. NICHOLS,
Impleaded, etc., Appellant.

A mortgage, the expressed consideration of which was \$15,000, was given as security for the payment "of any and all notes, checks and drafts" indorsed by the mortgagee for the accommodation of the mortgagor, or of any firm in which he "is interested or in any manner connected." At the time it was given there was but one note outstanding; this was for \$3,000, indorsed by N., the mortgagee, for the benefit of the mortgagor, and was paid by the latter. Subsequently the mortgagor executed another mortgage to D. N. thereafter, without notice of the second mortgage, and before it was recorded, indorsed other notes for the mortgagor, which he paid. In an action to foreclose the first mortgage, *held*, that as between the parties it was proper to show the circumstances, to aid in ascertaining the intent of the parties, and viewed in their light, the intent appeared to be to cover future as well as existing indorsements; also, that as plaintiff was not affected by the mortgage to D. the same rule of construction applied as to the latter; and that plaintiff's mortgage was a valid and prior lien.

(Argued March 14, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 9, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was to foreclose a mortgage given by the defendant Doxstater to the plaintiff upon three parcels of land June 18, 1888, and recorded April 8, 1889. The expressed consideration was \$15,000, and was given as security to the plain-

Statement of case.

tiff for the payment of "any and all notes, checks and drafts indorsed by the said Archibald Farr for the benefit or accommodation of said Robert H. Doxstater or of any firm in which said Robert H. Doxstater is interested or in any manner connected."

Before the mortgage was given the plaintiff had been indorsing for the accommodation of Doxstater and his firm. When the mortgage was given there was outstanding and unpaid one note at three months for \$3,000, dated April 16, 1888, made by Doxstater and indorsed by plaintiff. This note was renewed at maturity, and the renewal note paid by Doxstater September 22, 1888.

Meantime and on August 9, 1888, Doxstater executed and delivered to the defendant Nichols a mortgage upon the same premises to secure the accommodation indorsement by Nichols of five promissory notes of the same date made by Doxstater's firm and indorsed by Nichols, amounting in the aggregate to \$25,000. Nichols then had no notice of the mortgage to plaintiff. Nichols recorded his mortgage July 24, 1889. Nichols subsequently was compelled to pay upon these notes \$14,115, no part of which has been repaid him.

October 22, 1888, the plaintiff indorsed another note for Doxstater's accommodation for \$2,000 at ninety days, which being renewed, plaintiff paid in full August 10, 1889.

November 8, 1888, the plaintiff indorsed another note for Doxstater's accommodation for \$3,000 at three months, which being renewed, plaintiff paid in full August 30, 1889.

When plaintiff indorsed the two notes last mentioned he had no notice of the existence of the mortgage to Nichols.

The trial court held that plaintiff's mortgage was a valid and prior lien for the amount of plaintiff's payments upon the two notes last mentioned. The court refused to hold that the mortgage to plaintiff was not a continuing security and refused to hold that it only extended to the notes already indorsed by plaintiff at the date of its execution, and also refused to hold that it was invalid as against the mortgage given to Nichols.

Further facts are stated in the opinion.

Statement of case.

Charles Lyons, Jr., and Merritt E. Sawyer for appellant. The mortgage upon its face clearly shows that it was given as security only for notes indorsed at or prior to the time of its execution, and that it was not intended to cover future indorsements. (*Truscott v. King*, 6 N. Y. 147; *Young v. Wilson*, 27 id. 351.) If the mortgage does not express the real intention of the parties, it cannot be enlarged or extended as against this appellant. (*A. Bank v. Strever*, 18 N. Y. 502; *M. N. Bank v. Hall*, 83 id. 338; *Simons v. F. N. Bank*, 93 id. 269; *Juilliard v. Chaffee*, 92 id. 534; *Cody v. M. Bank*, 14 N. Y. S. R. 99; 113 N. Y. 657; *Agawan v. Streva*, 18 id. 502; *Truscott v. King*, 6 id. 147; *James v. Johnson*, 6 Johns. 417; *Shirras v. Caig*, 7 Cranch, 34; *Bank of Utica v. Finch*, 3 Barb. Ch. 293.) Plaintiff's mortgage must be held to have been discharged and satisfied, and that the same ceased to be a valid and subsisting lien as against this appellant's mortgage. (*Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Stoddard v. Hart*, 23 N. Y. 556; *Truscott v. King*, 6 id. 447.)

George S. Klock for respondent. The mortgage was a continuing security to the plaintiff, and secured the two notes indorsed and paid by him. (*A. Bank v. Strever*, 18 N. Y. 502; *M. N. Bank v. Hall*, 83 id. 338; *Simons v. F. N. Bank*, 93 id. 269; *N. C. Bank v. Hooper*, 2 N. Y. S. C. R. 288; *Crittenden v. Fiske*, 46 Mich. 70; *Bent v. Hartshorn*, 1 Met. 24.) A mortgage to secure future as well as present responsibilities is good. (*Walker v. Snedider*, 1 Hoff. Ch. 144; *James v. Johnson*, 6 Johns. Ch. 429; 2 Cow. 246; *Downing v. Palmateer*, 1 Mon. 69; *Star v. Ellis*, 6 Johns. Ch. 393; 7 Cranch, 34; *Ackerman v. Hunsicker*, 85 N. Y. 43; *Bank of Utica v. Finch*, 3 Barb. Ch. 294; *Truscott v. King*, 6 N. Y. 147; *Robinson v. Williams*, 22 id. 380; *Shirras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How. [U. S.] 14; *Leeds v. Cameron*, 3 Summ. 492; *Jarret v. McDaniel*, 32 Ark. 595; *Sanders v. Farrell*, 53 Ind. 28; *Forsyth v. Preer*, 62 Ala. 443.)

Opinion of the Court, per LONDON, J.

LONDON, J. The appellant claims that the plaintiff's mortgage by its terms covered past indorsements only, and did not cover those for which recovery was had.

This contention is based upon the terms of the mortgage which declares it to be given as security for the payment of "any and all notes, checks and drafts indorsed" by the plaintiff.

At the time plaintiff made his indorsements upon the last two notes of the mortgagor he had no notice, actual or constructive, of the existence of the mortgage to the appellant. He, therefore, had the same right to make indorsements upon the faith of his mortgage security as if the appellant's mortgage had not been made. (*Ackerman v. Hunsicker*, 85 N. Y. 43.)

Evidence was received to the effect that when the plaintiff's mortgage was given the plaintiff was indorser for the mortgagor upon only one note. That was for only \$3,000, and as the consideration expressed in the mortgage was \$15,000, and the mortgage was given to secure payment of "any and all notes, checks and drafts indorsed" by the plaintiff, the inference was justifiable that a series of indorsements to the amount of \$15,000, or nearly, was within the contemplation of the parties.

As between the plaintiff and the mortgagor it was proper to show the amount of the plaintiff's indorsements then existing, in order to aid in ascertaining whether they used the word "indorsed" in the mortgage solely with reference to such existing indorsements, or with reference to existing and future indorsements. (*Agawam Bank v. Strever*, 18 N. Y. 502; *Simons v. First National Bank*, 93 id. 269; *Merchants' Natl. Bank v. Hull*, 83 id. 338.)

Since the plaintiff was not affected by the appellant's mortgage, it follows that the appellant was in no position to resist the application of this rule of evidence.

The evidence showing the existence of the note when the mortgage was given, in connection with the evidence touching the two subsequent notes, was necessary to enable the court clearly to understand the subject-matter in controversy.

Statement of case.

When the facts were understood the terms of the mortgage were also understood; they were not altered or varied. The mortgage was for the protection of the plaintiff. The words "any and all notes, checks and drafts indorsed" are comprehensive words; there are no words restricting the meaning of the word "indorsed," such as now, heretofore, already, or which have been. The plaintiff may construe the promise as beneficially to himself as its terms will fairly admit.

We think the judgment should be affirmed.

All concur.

Judgment affirmed. _____

IDA K. HELWIG, Respondent, v. THE MUTUAL LIFE INSURANCE
COMPANY, of New York, Appellant.

By a policy of life insurance issued by defendant, the answers of the appellant to defendant's medical examiner were warranted to be true. In answer to the question "when last attended by a physician and cause?" the answer was "six years, measles." In an action upon the policy, for the purpose of proving the death, plaintiff produced in evidence a verified certificate, made about five months after the application, in which the attending physician stated that he had been the medical attendant or adviser of the decedent "for astralgia about one and a half years ago." *Held*, that the certificate could be availed of by defendant as evidence showing the falsity of the answer so made to the medical examiner; that the fact defendant would not have been permitted to introduce the statement in the certificate was not material; and, therefore, that a refusal of the court to charge, as requested by defendant, that this statement was to be taken into consideration by them was error.

(Argued March 15, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Opinion of the Court, per BRADLEY, J.

Robert Sewell for appellant. The certificate of the physicians given in evidence concludes the plaintiff. (*B. L. T. & S. D. Co. v. K. T. & M. M. A. Assn.*, 126 N. Y. 450; *Ins. Co. v. Newton*, 22 Wall. 22.) It was error to strike out on plaintiff's motion the testimony of physicians that they had "treated" Helwig professionally subsequent to 1881. (Code Civ. Pro. § 834; *Heath v. B. & S. A. R. R. Co.*, 25 J. & S. 496; *Henry v. N. Y., L. E., etc., R. R. Co.*, 10 N. Y. Supp. 508; *Cary v. White*, 59 N. Y. 336; *Steele v. Ward*, 30 Hun, 560; *Eddington v. Æ. L. Ins. Co.*, 77 N. Y. 564, 571; *People v. Schuyler*, 106 id. 298, 305; *B. L. T. & S. D. Co. v. K. T. & M. M. A. Assn.*, 126 id. 45.) It was fatal error in the court to charge that "nothing could be inferred from the testimony of the physicians alone further than the fact that they did not visit him; and the fact that he was suffering from a disease for which they attended him, cannot be drawn as a conclusion from their testimony. You must be satisfied from the other testimony in the case that such was the fact before you find the fact. And if you are not satisfied, your verdict should be for the plaintiff." (*Holt v. Holt*, 112 N. Y. 515; *Numrich v. Supreme Lodge*, 3 N. Y. Supp. 553.)

A. Simis, Jr., for respondent. Under the Code of Civil Procedure (§ 834) a person duly authorized to practice medicine is prohibited from disclosing any information acquired by him while attending a person in a professional capacity. (*Westover Case*, 99 N. Y. 56; *Grattan Case*, 80 id. 297.) The question whether there was a breach of warranty in that the thirtieth and thirty-first questions in the application were answered untruthfully was a question for the jury. (*Dilleber Case*, 69 N. Y. 263; *Cushman Case*, 70 id. 72; *Bancroft Case*, 120 id. 14; *Eddington v. M. L. Ins. Co.*, 67 id. 185.)

BRADLEY, J. The policy of insurance which is the subject of this action, was made upon the application of Richard W. Helwig, August 17, 1887, and by it the defendant upon certain conditions undertook to pay to the plaintiff, his wife, upon

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his death \$5,000. The application was part of the contract and the answers by him to defendant's medical examiner were in continuation of the application, and were warranted by the insured to be true. Amongst those questions and answers were the following: "When last attended by physician and cause? 6 years ago, measles. Name and address of the physician? Dr. Langsman, New York." The charge is that those answers were untrue and that the consequence was a breach of the warranty. And in support of that charge reference is made by the defendant's counsel to the attending physician's certificate made in January, 1888 (verified by his oath), of the death of the insured in December, 1887, in which certificate appear the following questions and answers: "Were you his medical attendant or adviser before his last illness? Yes. If so for what disease and when? For astralgia, about 1½ years ago."

It is urged that nothing in this certificate can be treated as evidence of breach of warranty because it was made to furnish proofs of the death of the insured; and that the matter of the declaration in question of the physician was such as he would not be permitted to disclose as a witness. It is true that by the contract the furnishing of proofs of death of the insured was made a condition precedent to the liability of the defendant. But by the policy it does not appear that the beneficiary of the insurance was to do anything more in that respect than to furnish to the defendant satisfactory proofs of death of the insured, upon the acceptance of which, and upon the conditions referred to in the policy, the defendant undertook to pay the amount of the insurance, so that it was not essential to such proofs, to represent his condition or medical treatment preceding the time of his death. It must be assumed that the certificate was put in evidence by the plaintiff, as it appears in the record after the case was opened on her part and before she rested; and in that view those statements of the physician were made evidence and tended to prove that the answers before mentioned of the insured to the questions of the medical examiner were untrue so far as they related to the time he had been last attended by a physician for medical treatment.

Statement of case.

(*Insurance Company v. Newton*, 22 Wall. 32; *Buffalo L. T. & S. D. Co. v. Knights T. & M. M. A. Assn.*, 126 N. Y. 450.)

The fact that the defendant would not have been permitted to introduce in evidence this declaration of the physician appearing in the certificate, is not important for the purposes of the question here presented, as the certificate was made evidence by the plaintiff without, so far as appears, any qualification.

If, as claimed by the plaintiff's counsel, the blank certificate was furnished by the company, it is not seen how that fact aids the plaintiff on this review.

The court was requested by the defendant's counsel to charge the jury that this statement of the doctor in the proofs of death, was to be taken into consideration by them. And the exception to the refusal to so charge was well taken.

For that error the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except HAIGHT and BROWN, JJ., not sitting.

Judgment reversed.

FRANCES E. COOPER, Respondent, v. THE UNITED STATES
MUTUAL BENEFIT ASSOCIATION, Appellant.

Defendant issued a certificate of insurance by which it undertook to insure C. against personal bodily injury; in case death resulted from such injuries within ninety days, defendant agreed to pay plaintiff, the wife of C., \$5,000. The certificate provided that no suit should be brought to recover "any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury." C. received an injury December 10, 1887, which resulted in his death January 2, 1888. This action was commenced December 29, 1888. *Held*, that, so far as plaintiff was concerned, the action was to be commenced within one year after the injury to her, which was the death of her husband, and the action having been commenced within a year therefrom, this action could be maintained.

King v. Watertown F. Ins. Co. (47 Hun, 1), distinguished.
Reported below, 57 Hun, 407.

(Argued March 16, 1892; decided April 19, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William Bro Smith for appellant. This action was not brought "within one year from the time of the alleged accidental injury," as required in the contract made by the parties, and, therefore, as it is not pretended or claimed that appellant did or omitted anything upon which a waiver of this condition could be predicated, the judgment appealed from cannot be sustained. (*King v. W. F. Ins. Co.*, 47 Hun, 1; *Wilkinson v. F. N. F. Ins. Co.*, 72 N. Y. 499; *Steen v. N. F. Ins. Co.*, 89 id. 315; *Fullam v. N. Y. U. Ins. Co.*, 7 Gray, 61; *Shroeder v. K. Ins. Co.*, 2 Phila. 286; *H. Ins. Co. v. Hocking*, 18 Atl. Rep. 614; *Steel v. P. Ins. Co.*, 47 Fed. Rep. 863; *Muse v. L. A. Co.*, 108 N. C. 240; *Thompson v. P. Ins. Co.*, 25 Fed. Rep. 296; *Griggsby v. G. Ins. Co.*, 40 Mo. App. 276; *Meesman v. S. Ins. Co.*, 27 Pac. Rep. 77; *Tuttle v. T. Ins. Co.*, 134 Mass. 175; *Riddlesbarger v. H. Ins. Co.*, 7 Wall. 386; *Spare v. Ins. Co.*, 9 Sawy. 145; 11 id. 279.)

Lewis E. Carr for respondent. As the instrument emanated from the obligor, and the obligee had no voice in its preparation, its terms are to be construed most strongly against the obligor, and all doubts are to be solved in favor of the one in whose favor the promises were made, and against the one by whom the instrument was prepared. (*Mayor, etc., v. H. F. Ins. Co.*, 39 N. Y. 42, 46; *Hay v. S. F. Ins. Co.*, 77 id. 235, 241; *Hoffman v. A. F. Ins. Co.*, 32 id. 405, 413, 414; *Steen v. N. F. Ins. Co.*, 89 id. 315, 324; *Paul v. T. Ins. Co.*, 112 id. 472, 479; *Kratzenstein v. W. A. Co.*, 116 id. 54, 59.) All parts of the instrument are to be taken together and such construction given as will make all of its parts and terms harmonious and consistent. (Broom's Leg. Max. 657; *Allen v.*

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S. L. Ins. Co., 85 N. Y. 473.) The action is to recover the amount agreed to be paid for a death resulting from the causes, and within the time limited in the certificate. The time therein limited for commencing actions does not bar an action for a death claim commenced within a year from the death, although more than a year from the injury. (*Ames v. U. F. Ins. Co.*, 14 N. Y. 253, 264, 265; *Hay v. S. F. Ins. Co.*, 77 id. 235, 242, 243; *Mayor, etc., v. H. F. Ins. Co.*, 39 id. 45, 47; *Steen v. N. F. Ins. Co.*, 89 id. 313; *King v. W. Ins. Co.*, 47 Hun, 1; *Holly v. M. L. Ins. Co.*, 105 N. Y. 437; *Dennis v. M. B. Assn.*, 120 id. 496.) The limitation clause does not apply to a death claim. (*Mallory v. T. Ins. Co.*, 47 N. Y. 52; *Paul v. T. Ins. Co.*, 112 id. 472; *Dennis v. M. B. Assn.*, 120 id. 496, 506; *Vil. of Port Jervis v. F. N. Bank*, 96 id. 550, 560; *Ormes v. Dauchy*, 82 id. 443.)

HAIGHT, J. This action was brought upon a certificate of insurance, issued by the defendant, to recover five thousand dollars.

The defendant, by its certificate, undertook to insure Theodore H. Cooper against personal bodily injury, and in case he should receive such injuries disabling him from transacting business pertaining to his occupation to pay him certain amounts specifically named in the certificate, dependent upon the nature of his injuries, and in case death should result from such injuries within ninety days to pay to the plaintiff, as his wife, the sum of five thousand dollars.

The certificate contained the following :

"No suit or proceeding at law or in equity shall be brought * * * to recover any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury."

Cooper received an accidental bodily injury on December 10, 1887, which resulted in his death on January 2, 1888.

This action was commenced on December 29, 1888, more than one year after the accident, but within one year of his death.

Opinion of the Court, per HAIGHT, J.

It is claimed that the action was not commenced within the time required by the provision of the certificate referred to.

It will be observed that provisions are made in the certificate for two different persons who, upon the happening of the events specified, may have a right of action against the association. One provision is in favor of Cooper, who may recover during his life-time the amounts provided for his disability resulting from the accidental injury received. The other is to his wife, which is for the injuries which she suffers by reason of his death resulting from such accident.

The accident received by Cooper did not injure the plaintiff or give her a right of action until death ensued. So far as she is concerned the infliction of the wound is but the beginning, and the death is the completion of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury." In other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident.

As to Cooper, he suffered from the date of the wound. His right to indemnity dates from that event, and it is possible that his right to maintain an action would not continue after the expiration of a year from that date.

But as to the plaintiff, it appears to us that the construction already indicated was intended, and should be given to the certificate. As thus construed the various clauses of the contract are rendered harmonious, and the different beneficiaries thereunder are given the same period of limitation within which to bring actions to establish their claims.

This construction is, in a measure, sustained by the authorities.

In the case of *Steen v. Niagara Fire Insurance Company* (89 N. Y. 315), the policy of insurance required actions to be brought within twelve months next after the "loss or damage shall accrue." In an action upon the policy it was held that the period of limitation prescribed did not commence to run until the loss became due and payable and the right to bring an action had accrued.

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And to the same effect are the cases of *Mayor, etc., v. Hamilton Fire Insurance Company* (39 N. Y. 45) and *Hay v. Star Fire Insurance Company* (77 id. 235).

The case of *King v. Watertown Fire Insurance Company* (47 Hun, 1) appears to us to be clearly distinguishable. In that case the policy provided that no suit or action could be maintained unless commenced "within twelve months next after the fire shall have occurred." In that case it was held that the year within which the action must be brought commenced to run from the date on which the fire occurred, it so having been expressly stipulated in the policy.

We consequently are of the opinion that the judgment should be affirmed, with costs.

All concur, except VANN, J., not sitting.

Judgment affirmed.

REBECCA GALLAGHER et al., Appellants, v. SUSAN CROOKSET et al.,
Respondents.

SAME, Appellants, v. SAME, Respondents.

To cut off the right of an heir to inherit there must be a legal devise; mere words of disinheritance are insufficient to effect that purpose.

Where, therefore, a testator fails to make a legal devise of his realty, or having legally devised it, the devise fails for any cause, the heir will inherit notwithstanding there is an express provision in the will that he shall not take any part of the estate.

It seems, the word "relations," when used in a will relating to personality, only embraces persons within the Statute of Distribution.

As to whether the word when used in a devise is limited to persons within the Statute of Distribution, or to those within the Statute of Descent, *quære*.

In an action of ejectment the following facts appeared: The premises in question belonged to one G., who died leaving a will, by which he devised and bequeathed his property to his widow for life, subject to an annuity to his brother J.; after her death he provided for the payment of certain bequests and directed that the remainder, if any, be equally divided between the children of J. G. and all the testator's relations by his father's side in the United States at the date of his will,

Statement of case.

subject to the payment of said annuity to J. The will then provided as follows: "He (J.) is to have nothing from my property, and I hereby cut off from inheriting any thing or property of mine his wife, or any person in any way related to her, either by blood or marriage, with the exception of himself, and he only in the way I have stated above." After the death of the testator's widow this action was brought by the widow, the children and grandchildren of J. Plaintiffs gave evidence tending to show that J. G. died unmarried and without children, and that the testator had no relatives living in the United States at the date of his will or death who were descended from his grandfather or father, other than plaintiffs. *Held*, that while the burden was upon plaintiffs of showing that there were no persons living who could take as remaindermen, it was sufficient to make out a *prima facie* case, and as their evidence showed the existence of any such person to be improbable, it was sufficient for that purpose, and that, therefore, a nonsuit was error.

(Argued March 16, 1892; decided April 19, 1892.)

APPEALS from judgments of the General Term of the Supreme Court in the first judicial department, each of which was entered upon an order made July 18, 1890, which affirmed a judgment in favor of defendants entered upon an order nonsuiting plaintiffs on trial at Circuit, and also affirmed an order denying motions for a new trial.

The nature of the actions and the facts, so far as material, are stated in the opinion.

Robert O. Byrne for appellants. The court erred in dismissing the complaint upon defendants' motion, and in not allowing the case to be given to the jury. (*North Brookfield v. Wainer*, 16 Gray, 174; *Whitelock v. Baker*, 14 Ves. 514; 26 How. Pr. 244; *Conjotte v. Ferrie*, 23 N. Y. 90; *Jackson v. Bonham*, 15 Johns. 226; *Russell v. Jackson*, 22 Wend. 276; 1 Greenl. on Ev. § 103; *Monkton v. Atty.-Gen.*, 2 R. & M. 165; *Johnson v. Todd*, 5 Beav. 599; *Doe v. Griffin*, 15 East. 293.) An escheat cannot take place. (*Jackson v. Jackson*, 7 Johns. 214; 2 Black. Comm. 245, chap. 15; 3 Jarman on Wills, 704, 705; *Johnson v. Johnson*, 4 Beav. 318; *Pickering v. Stamford*, 3 Ves. 493; *Underwood v. Wing*, 4 DeG., M. & G. 633; 8 H. L. Cas. 183; Theobald on Wills, 443; 2

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Redfield on Wills, 163; *Brown v. Hope*, L. R. [14 Eq.] 343; *Kimball v. Story*, 108 Mass. 382; *Fitch v. Weber*, 6 Hare, 145.)

R. B. Gwillim for respondents. In actions of ejectment plaintiffs must recover upon the strength of their own title, and cannot depend upon the weakness of the title of the defendants, or upon the fact that the defendants may have no title whatever beyond the presumption of title arising from the fact of being in possession of the property at the time the action was commenced. (*Roberts v. Baumgarten*, 110 N. Y. 385; *Wallace v. Swinton*, 64 id. 192.) The testator, being of sound mind, had the right to disinherit his brother and his children and descendants by his wife Rebecca. (*Howland v. U. T. Society*, 5 N. Y. 217.) If there was any person answering to the description of a child of John Grady, or a blood relative of the testator's father, at the time of the making of his will, the whole remainder, including the premises in dispute in this action, descended to, and became vested in, that one. The devise was to the children of Grady, and the blood relatives of the testator's father as a class, and if but one, he took the whole; and if more than one, they took equally. (*Hoppock v. Tucker*, 59 N. Y. 202; *Page v. Gilbert*, 32 Hun, 301.) The law does not favor intestacy, nor a failure of heirs, descendants and next of kin, where a devise or bequest is made to the children, and relations of one or more persons, the legal presumption is that at the time of the making of the will, and the testator's death, there were persons answering the description in the will. (*People v. F. F. Ins. Co.*, 25 Wend. 218.)

FOLLETT, Ch. J. Action No. 1, ejectment, was brought to recover a lot in the city of New York, known as No. 325 Third street, of which James D. Gallagher died seized.

Action No. 2, ejectment, was brought to recover a lot in said city, known as No. 34 Scammel street, of which James D. Gallagher died seized.

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He left a will executed April 16, 1843, which was duly probated January 29, 1845, by which he devised all of his realty and bequeathed all of his personalty to his widow, Ellen Gallagher, during life, subject to the payment of three dollars per week (before his widow's death) for the support of his brother John N. Gallagher, if he should be unable to maintain himself. After the death of the widow he directed that \$1,000 should be paid to the Roman Catholic Orphan Asylum; \$1,000 should be divided between Edward Harrigan and Bernard Harrigan, and he authorized his widow to bequeath \$1,000 to any person she might see fit; "the remainder, if any, to be equally divided between the children of John Grady and all my relations by my father's side" that were in the United States at the date of his will, subject to the payment of four dollars per week (after his widow's death) for the support of his brother John N. Gallagher, if necessary for his maintenance. The will contains the following clause: "He (John N. Gallagher) is to have nothing from my property, and I hereby cut off from inheriting anything or property of mine, his wife (Rebecca), or any person in any way related to her, either by blood or marriage, with the exception of himself, and he only in the way I have stated above."

It seems to be undisputed that in 1798 John Gallagher emigrated from Ireland to the United States, soon thereafter became a resident of the city of New York, where he and Catherine Gallagher intermarried, at which city he died in 1836, leaving his widow and two sons, James D. Gallagher and John N. Gallagher, both born in New York, who were his only heirs. About 1842, Catherine, the widow of John and the mother of James D. and John N., died. In 1833, John N. Gallagher and Rebecca Noe intermarried at the city of New York, where they resided as husband and wife until December 4, 1875, when he died, leaving Rebecca, his widow, John N., Thomas B., Catherine F., Rebecca T. and Mary L., his children and only heirs. Mary L. and Charles A. Hammer intermarried and subsequently both died, leaving Charles A. Hammer and Norman Hammer, their children and only

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heirs. Ellen Gallagher, the widow of James D., the testator, died July 1, 1879.

These actions were begun in 1886 by the heirs of John N. Gallagher, who claimed the fee of the lots, and by Rebecca Gallagher, his widow, who claims a dower right in them. The defendants answer that Susan Crooks and John Crawford were lawfully seized of both lots in fee, but how they acquired title, if any they have, or possession of the lots, is not disclosed by the answers nor by the evidence. The other defendants are tenants of Crooks and Crawford.

The clause in the will above quoted, by which the testator attempted to disinherit his brother, his wife and their descendants, does not defeat the right of these plaintiffs to the estate unless the persons to whom the testator attempted to devise the remainder were in existence. In case a testator fails to make a legal devise of his realty, or if having legally devised it the devise fails for any cause, the heir will inherit, notwithstanding there is an express provision in the will that he shall not take any part of the estate. There must be a legal devise to cut off the right of the heir to inherit; mere words of disinheritance are insufficient to effect that purpose. (*Haxtun v. Corse*, 2 Barb. Ch. 521; *Chamberlain v. Taylor*, 105 N. Y. 185, 193; *Fitch v. Weber*, 6 Hare, 145; *Pickering v. Stamford*, 3 Vesey, 493; *Johnson v. Johnson*, 4 Beav. 318; 2 Jar. Wills [Bigelow's ed.], 841; 1 Red. Wills [4th ed.], 425.)

To entitle the plaintiffs to recover they were bound to establish, (1) that John Grady left no children; (2) that the testator had no relatives by his father's side in the United States at the date of his will, or at the date when the devise of the remainder took effect. These were the facts in issue.

Rebecca Gallagher, the widow of John N., who was seventy-nine years of age when her deposition was taken, testified that she knew John Grady, a nephew of the testator's wife, and that he had been dead several years, that he never married, and left no children. This witness also testified that she was familiar with the history of the family of her husband and of his father, and that she had heard the father, John Gallagher,

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say that he was the only child of his parents, who died in Ireland, and that he had no relatives living. Her evidence was corroborated by her sons. If this testimony is true, and it was not contradicted, the testator had no relatives living in the United States at the date of his will or death, unless he intended that the words "all my relations by my father's side" should include the descendants of his great-grandfather, or of some more remote ancestor. It was not shown whether the great-grandfather left any descendants other than those in the line of the testator's family, but it was shown that the plaintiffs are all of the descendants of the testator's father. Accepting the Mosaic account of the origin of the human race, the testator must have had, at the date of his will and at the date of his death, collateral relatives on his father's side, of some degree, in the United States. But such a broad interpretation of the meaning of the word "relations" would render the devise void for indefiniteness, and it is well settled that the word when used in wills relating to personalty only embraces persons within the Statute of Distribution. (*Edge v. Salixbury*, 1 Amb. 70; *Crossly v. Clare*, Id. 396; *S. C.*, 3 Swanst. 320; *Harding v. Glyn*, 1 Atk. 469, and cases cited in Sanders' note; *Goodinge v. Goodinge*, 1 Ves., Sr., 231; *Varrell v. Wendell*, 20 N. H. 431; *Ennis v. Pentz*, 3 Bradf. 382; *Eagles v. LeBreton*, L. R. [15 Eq.] 148; *Hibbert v. Hibbert*, Id. 372; 2 Jar. Wills [Big. ed.], 120; 2 Red. Wills [3d ed.], 85; 2 Wm. Ex. [6 Am. ed.] 1205; 4 Kent's Com. [13th ed.] 537, note a.) But whether, in case of a devise, the word "relations" embraces only persons within the Statute of Distribution, as was held in *Doe v. Over* (1 Taunt. 263), or only the class within the Statute of Descent, we will not now decide. The English cases cited, which relate to devises, arose before the English Statute of Descents (3 & 4 Will. IV, c. 106), and when the descent of realty in that country was determined by the rules of the common law. (1 Steph. Com. [8th ed.] 387; Will. Real Pr. [12th ed.] 100.) While the evidence does not make the existence of relatives of the testator by the father's side in the United States, which were

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within the classes embraced within the Statute of Distribution or the Statute of Descents, impossible, it does render the existence of such persons improbable. It is seldom possible to demonstrate, or establish to an absolute certainty, the existence or the non-existence of the facts at issue between the litigants, and the law does not require such a high degree of proof, but such evidence as renders the existence of the facts in issue, and upon which the right to recover depends, probable, is sufficient to require the party who denies their existence to sustain his denial by evidence. Certainty is not required to convict persons of criminal offenses. We think, from the evidence, that it is probable that no persons of either class mentioned in the testator's will were in existence at its date, or have been since, and that the plaintiffs made out a *prima facie* case.

The judgments should be reversed and new trials granted, with costs to abide the event.

All concur.

Judgments reversed.

JOHN R. PUTNAM, Appellant, v. THE STATE OF NEW YORK,
Respondent.

Upon a claim presented by P. against the state, the Board of Claims found that for many years P. was the owner and in possession of a dry-dock connected with a large basin upon the land of the state, opening into the Erie canal; across the mouth of the basin was maintained a bridge which was a part of the tow-path. The basin was filled with water from the canal and the surplus water of the canal flowed through P.'s land. The only means of communication between the dry-dock and the canal was through the basin. The bridge was a swing bridge which had been erected by the claimant, with the consent of the state. In the spring of 1886, before the opening of navigation and when there was no water in the canal, the state removed the bridge, erected in its place a stationary bridge at the same level as the tow-path, offering to allow claimant to erect a new elevated bridge, which offer it did not appear he accepted. By reason of the change, P. was unable to move two boats which he had at that time, one in the basin and the other in the dry-dock. The court found that there was no liability on the part of the state. *Held, error;*

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that while the privilege enjoyed by P. was revocable at the will of the state, it included an obligation which the state could not withdraw from arbitrarily, when this would inflict severe loss upon P.; that the erection of the bridge by him and his allowance of the discharge of the surplus waters across his land constituted presumably in some measure the consideration for the privilege and, having permitted him to place his boats inside the bridge and thereafter withdrawn the water, the state was bound to afford him a reasonable opportunity to remove them; and that this obligation was not met by the offer to allow him to erect a new bridge.

(Argued March 18, 1892; decided April 19, 1892.)

APPEAL from decree of the Board of Claims made December 19, 1888, which dismissed the claim herein and awarded nothing thereon.

The facts are sufficiently stated in the opinion.

H. B. Cushney for appellant. The elevated bridge and the draw bridge were built and maintained by claimant under a valid agreement with the officers of the state, the state deriving benefit from it by using the same for the discharge of water from the canal through claimant's waste wier and also through the use of the same by boatmen navigating the canal in the repairing of boats, and the building of the permanent bridge before the opening of navigation, at a time when it was impossible to remove said canal boats from the dry-dock and the water basin adjacent thereto was an arbitrary exercise of power, unwarranted and without authority on the part of the superintendent. (*Dermott v. State*, 99 N. Y. 101.)

S. W. Rosendale, Attorney-General, for respondent. Every act of the state complained of was performed upon property owned by the state. (1 R. S. [8th ed.] 732, § 52.) The claimant cannot recover damages alleged to have been occasioned by the state in the performance of a lawful act upon its own property. (*Burbank v. Fay*, 65 N. Y. 57; *Murdock v. P. P. & C. I. R. R. Co.*, 73 id. 579; *Babcock v. Utter*, 1 Keyes, 397; *Knick. Co. v. Shultz*, 116 N. Y. 388; *Dermott v. State*, 99 id. 101; *Whitney v. State*, 96 id. 240; *S. V. O. Asylum v. Troy*, 76 id. 108; *Moyer v. N. Y. C. R. R. Co.*, 88 id. 351;

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Bellinger v. N. Y. C. R. R. Co., 23 id. 48; *Victory v. Baker*, 67 id. 366.) The item for loss of use of dry-dock was the only question before the Board of Claims and the only question for review here. (Laws of 1883, chap. 205, §§ 7, 11.)

BROWN, J. The claimant sought to recover damages for several alleged causes. We concur in the conclusion reached by the Board of Claims in all, except one. It appears from the findings of the court that for many years prior to 1886 the claimant was the owner and in possession of a dry-dock in the village of Fultonville, situate on the northerly side of the Erie canal. The dock connected with a large basin which opened into the canal. The basin was upon the land of the state and across its mouth was maintained a bridge which was a part of the tow-path.

The water from the canal filled the basin and thence flowed into the dry-dock. The only means of communication between the canal and the dry-dock was through the basin.

The bridge maintained across the basin was at one time an elevated one, at another a draw bridge, and after that a swing bridge which had been erected by the claimant with the consent of the state.

In the spring of 1886 for reasons satisfactory to the state it removed the swing bridge and erected in its place a stationary bridge at the same level as the tow-path.

At that time the claimant had a canal boat lying in the basin and one in the dry-dock, and by reason of the construction of the said stationery bridge he was unable to move said boats from said basin and dry-dock and lost the use thereof. It appeared from the evidence that the reason why the boats could not be moved was that the bridge was constructed before the opening of navigation and when there was no water in the canal.

The court further found that at the time of constructing said bridge the assistant superintendent of public works told the claimant that he (claimant) could erect a suitable bridge that would meet the requirements of the state and permit the

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use of his property, if he wished, and when he did so the stationary bridge would be removed, and that the claimant did not avail himself of that privilege.

Upon such facts the court found that there was no liability upon the part of the state.

We think this conclusion was erroneous.

The privilege which the claimant enjoyed was one revokable at the will of the state, but it included an obligation which the state could not withdraw from arbitrarily and subvert at its mere will and pleasure. It appeared that the surplus waters of the canal flowed out through the claimant's land and that the bridge, which was removed in the spring of 1886, had been erected at the claimant's expense, and it is fair to assume that these things constituted in some measure the consideration for the privilege which the claimant enjoyed in the basin. In the absence of express contract the law often infers a promise from one party to the other arising from the nature of the transaction, and when the circumstances authorize the assumption that such was in the contemplation of the parties, and the implied promise in such cases is such that justice would dictate under the particular facts presented to the court.

We must assume such a promise in this case, for it cannot be that it was in the contemplation of the parties that the privilege given could be withdrawn at a time and under circumstances that would inflict severe loss upon the claimant.

And having been permitted to place his boats inside of the bridge in the fall of the year and the state having thereafter withdrawn the water from the canal, it was bound to afford him a reasonable opportunity to remove them.

This he was deprived of by the construction of the low stationary bridge before there was water in the canal upon which to float the boats. This right of which claimant was deprived was not overcome by the offer to permit him to erect a new elevated bridge at his own expense. There is no finding or evidence that he accepted that offer. He was entitled to reasonable notice and opportunity to remove the boats, and unless it appeared that in some way he had waived or surren-

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dered such rights he had a valid claim for damages against the state.

The order and award should be reversed and a new trial granted.

All concur.

Order and award reversed.

J. FREDERIC ANDREWS, Appellant, v. THE DAY BUTTON
COMPANY, Respondent.

Plaintiff executed a lease, for a term of years, of certain premises, consisting of a factory, engine and boiler-house in which were an engine and machinery; the lease contained a covenant that the lessee would not make any alteration in the premises without the consent of plaintiff, "under the penalty of forfeiture." The engine being worn out and dangerous, the lessee requested plaintiff to share with him the expense of taking it out and putting in a new one; this plaintiff declined to do. Thereupon the lessee advised plaintiff by letter that it should remove the old engine, protect it from the weather, leave it upon the premises and substitute one of its own for use. Plaintiff replied that he had no objections to the exchange, provided the new engine was placed on the same foundation and a receipted bill given to him therefor. The old engine was so affixed to the foundation that it could be removed and a new one substituted without injury to the foundation or the building. The lessee removed the old engine, placed it under cover, and put in a new one on the old foundation. In an action to restrain defendant, who had succeeded to the rights of the lessee, from removing the new engine from the premises, *held*, that the substitution thereof was not necessarily an alteration, and as it appeared that no substantial alteration was made, and that, on removal of the new engine, the old one could be replaced, plaintiff's consent to the substitution was not requisite; that therefore there was no legal obligation resting upon the lessee which would necessarily charge it with the terms or conditions upon which plaintiff assumed to consent; that as the lessee did not in fact accede to those terms, but proceeded upon a declared purpose to the contrary, plaintiff took no title to the engine; that the lessee had the right to make the change and defendant to remove the new engine; and so, that the action was not maintainable.

L'Amoreux v. Gould (7 N. Y. 349); *Willets v. Sun Mut. Ins. Co.* (45 id. 45); *White v. Baxter* (9 J. & S. 358; 71 N. Y. 254), distinguished.

Reported below, 55 Hun, 494.

(Argued March 21, 1892; decided April 19, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The relief sought by this action was that the defendant be restrained from removing an engine from certain premises which the plaintiff had, by lease of date March 26, 1886, demised to the Fox Changeable Button Company for the term of five years and six months from the first of the then-following April. The lease contained a covenant on the part of the lessee that it would not make any alteration in the premises without the consent of the plaintiff, "under the penalty of forfeiture and damages." The demised premises consisted of a brick factory, an engine and boiler-house, in which and covered by the lease were boilers, engine, grinding mills, shafting and steam pumps.

The lessee, soon after the commencement of the term, took out the engine and put a new one in its place to operate the machinery. The defendant afterwards acquired by purchase the rights of the lessee in the demised premises and title to its personal property therein, and before the commencement of the action, had threatened to remove the engine so put in there by the lessee.

Further facts are stated in the opinion.

Michael H. Cardozo for appellant. The assent of the parties to a contract may be shown as well by their acts as by their words. (1 Whart. on Cont. § 6; Chitty on Cont. [11th Am. ed.] 86; *Roberts v. Hayward*, 3 C. & P. 432; *Patten v. Hood*, 40 Me. 457; *C. B. Co. v. Abbott*, 4 Cush. 573; *White v. Baxter*, 9 J. & S. 358; *Willetts v. S. M. Ins. Co.*, 45 N. Y. 45; *L'Amoureux v. Gould*, 7 id. 349.) The defendant and his assignor had absolutely no right to remove the old engine and substitute a new one without the permission of the owner. (*Agate v. Lougenbein*, 57 N. Y. 604.)

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Gibson Putzel for respondent. The new engine having been placed in the engine-house by the lessee for trade purposes and with the intention of removing it on the termination of the lease, remained personal property and did not become a fixture. (*Elves v. Mawe*, 3 East. 22; *Miller v. Plumb*, 6 Cow. 665; 2 Kent's Comm. [7th ed.] 345; *Walker v. Sherman*, 20 Wend. 636; *Potter v. Cromwell*, 40 N. Y. 287; *House v. House*, 10 Paige, 163; *Holmes v. Tremper*, 20 Johns. 29; *Van Ness v. Pacard*, 2 Pet. 137; *Dubois v. Kelly*, 10 Barb. 496; *Moore v. Wood*, 12 Abb. Pr. 393; *Kelsey v. Durkee*, 33 Barb. 410; *Voorhees v. McGinnis*, 48 N. Y. 278; *Tift v. Horton*, 53 id. 377; *Sisson v. Hibbard*, 75 id. 542; *McRea v. C. N. Bank*, 66 id. 489; *Davidson v. W. G. Co.*, 99 id. 568.) There was no express or implied contract between the plaintiff and the Specialty Button Company that the new engine should belong to the former. (*White v. Baxter*, 71 N. Y. 224; *Train v. B. D. Co.*, 144 Mass. 533; *C. B. Co. v. Abbott*, 4 Cush. 473; *Whitney v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 130 id. 590.) The removal of the old engine did not constitute waste. (*Van Ness v. Pacard*, 2 Pet. 137; Washb. on Real Prop. 1, 114; *Clemence v. Steere*, 1 R. I. 272; *Austin v. Stevens*, 24 Me. 520; *Washburn v. Sproat*, 16 Mass. 449; *Holbrook v. Chamberlin*, 116 id. 155; *Jones v. Chappell*, L. R. [20 Eq.] 539; *Young v. Spencer*, 10 B. & C. 145; *Jackson v. Tibbits*, 3 Wend. 341; *Beers v. St. John*, 16 Conn. 322; *Winship v. Pitts*, 3 Paige, 261; *Agate v. Lowenbein*, 57 N. Y. 604; *Cooper v. Cooper*, 147 Mass. 373.) In determining whether property retains the character of personalty or becomes a fixture, the purpose of the annexation and the intent with which it was made are the most important considerations. (*McRae v. C. Bank*, 66 N. Y. 489.)

BRADLEY, J. The action was founded upon the charge that the lessee had no right to remove the old engine and substitute the new one without the permission of the plaintiff; that his consent was given upon the condition that the new engine should belong to him, and that the old engine was taken out

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and the new one put in pursuant to such consent. If the evidence required the adoption of those propositions, the plaintiff was entitled to the relief sought by the action. But the trial court refused to find that the lessee made such removal and substitution pursuant to the permission of the lessor, and to such refusal exception was taken. This was an important question of fact. And on that subject evidence on the part of the defendant was to the effect that the engine in the building at the time of the demise was unsound, worn out and dangerous to use; that the plaintiff was advised of its condition, and requested to make an arrangement to share with the lessee the expense of taking it out and putting a new one in its place; that he declined to do so, and that the lessee thereupon concluded to do it, and advised the plaintiff by letter that it should remove the old engine, protect it from the weather, leave it upon the premises and substitute one of its own to use in place of it. A few days after this communication was made to the plaintiff, the lessee received from him a letter as follows:

"NEW YORK, April 6, 1886.

"*The Fox Changeable Button Company* :

"GENTLEMEN.—In regard to engine in my factory at Astoria, I have no objection to your changing it for a smaller one, providing you place the engine which you receive on same foundation and give me a receipted bill for new engine.

"I am yours truly,

"J. F. ANDREWS."

The old engine was, by the lessee, afterwards taken out, placed under cover in the yard of the premises, and the new one placed on the foundation which had supported the one removed. There was no express agreement of the lessee to vest in the plaintiff title to the new engine. But it is argued that the consent of the plaintiff was essential to the right to do what was done in that respect, and, therefore, a promise on the part of the lessee to comply with the condition upon which the permission of the plaintiff as expressed in his letter was given, was necessarily implied. This would be so if the lessee

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must be deemed to have accepted the terms upon which the plaintiff's consent appeared by his letter to have been given. Then there would have arisen a contract rendered effectual by performance. (*L'Amoreux v. Gould*, 7 N. Y. 349; *Willette v. Sun Mut. Ins. Co.*, 45 id. 45; *White v. Baxter*, 9 J. & S. 358; 71 N. Y. 254.)

The doctrine of those cases is that a promise without mutuality may be supported by subsequent performance of that in consideration of which the promise was made.

In the present case there was no promise in fact of the lessee to give the plaintiff the benefit of the title to the new engine, but the express declaration of the representative of the lessee may have been construed as repugnant to the implication of a promise to do so. And in such case the law will imply a promise, only when there is a legal duty or obligation to support it. (*Whiting v. Sullivan*, 7 Mass. 107; *Central Bridge Co. v. Abbott*, 4 Cush. 473; *Earle v. Coburn*, 130 Mass. 596.) And it may be added that as a rule, when the owner of property having the rightful power to withhold it and its use, prescribes the terms upon which it may be taken, appropriated or used by another, who takes it advised of the terms, the latter will be deemed to have acquiesced and may be charged with the promise to comply with them. The plaintiff's proposition is that the lessee had no right without his consent to remove the one and substitute the other engine, and having applied to the plaintiff for permission, which was granted upon terms, the lessee must be deemed to have proceeded pursuant to the right so given, and, as the consequence he took title. This view is plausible and apparently forcible. The evidence, however, on the part of the defendant tends to prove that the lessee did not apply to the plaintiff for his consent to make the change, but simply to induce him to enter into an arrangement to share the expense of putting in the new engine; and that not obtaining the plaintiff's assent to do so, the lessee assumed the right to take out the old engine, put in a new one in its place and retain title to the latter. And the trial court accordingly found that the lessee had no design

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or intention at any time of attaching the engine to the freehold, but on the contrary the intention of the lessee at the time of placing it in the engine-house was to remove it on the determination of the lease. This finding was warranted by evidence, and whether it is effectual to support the defendant's claim of title to the engine, becomes a question of law. As between landlord and tenant, the latter, except so far as his rights are limited by the lease, is at liberty to erect structures for the purpose of carrying on his legitimate business upon the demised premises and remove them within the term, unless the effect will be to commit waste or to do serious injury to the realty. (2 Kent's Com. 345; *Miller v. Plumb*, 6 Cow. 665; *Ombony v. Jones*, 19 N. Y. 234; *Globe Marble Mills Co. v. Quinn*, 76 id. 23; *Kelsey v. Durkee*, 33 Barb. 410; *Trappes v. Harter*, 2 Crompton & M. 153.)

The covenant of the lessee that he would not make any alteration in the premises without the consent of the landlord, was only an undertaking imposed by law, which is to the effect that any material and substantial change or alteration of the nature of the property is waste. (*Agate v. Lovenbein*, 57 N. Y. 604.) And it is such, although it may not in its consequences be prejudicial to the landlord. The expression of the chancellor on the subject in *Winship v. Pitts* (3 Paige, 259), was that the tenant has no right "to make improvements or alterations, which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises substantially at the expiration of the term."

The substitution of the new engine for use by the tenant in place of the old one and the suspension during that time of the use of the latter, was not necessarily an alteration or change of the nature of the premises in any substantial respect. The tenant clearly had the right to place a new engine upon another foundation if room permitted it, and to allow the old one to remain idle. And in such case the right of the tenant to take away the one so placed there would have been clear.

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There was evidence to the effect that the old engine was in no condition for use with safety, and that it was essentially useless for the purposes of the business of the factory. And the findings of the court, supported by evidence, were to the effect that the old engine was so affixed to the foundation on which it rested that it could be removed from it and from the engine-house and the new engine taken in and substituted for it without injury to either the foundation or the building. And the conclusion was permitted by the evidence that it was so done as to produce no injury to the premises or to the engine so taken out. It would, therefore, seem to follow that no substantial alteration was made in the situation, condition or nature of the premises, but that on removal of the new engine the old one could be restored to the foundation from which it was taken. In this view there was no legal obligation to necessarily charge the lessee by implication with the terms or conditions upon which the plaintiff assumed to consent to the removal of the old engine and the substitution of the new one by the lessee. And as the latter did not in fact accede to the terms, which the plaintiff sought to impose, but proceeded upon the declared purpose to the contrary, the plaintiff took no title to the engine in question.

The determination of the trial court of the questions of fact founded upon conflicting evidence must, for the purposes of this review, be deemed conclusive.

None of the exceptions were well taken.

The judgment should be affirmed.

All concur, except PARKER and LANDON, JJ., dissenting.

Judgment affirmed. •

Statement of case.

MARY V. AMERMAN, Appellant, v. BERTHA A. DEANE,
Respondent.

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168	195

Where the owner of lands in a city has laid it out into lots, which are sold to different purchasers, each conveyance containing covenants on the part of the grantee running with the land restricting the use thereof to the purposes of a private residence, or prohibiting the erection thereon of certain specified structures, while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee or his successors in title of the privilege of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed.

One B. owned a block of land in the city of New York, which he divided into lots for private residences and conveyed to different parties by deeds, each of which contained a covenant on the part of the grantee, his heirs and assigns, not at any time thereafter to erect, suffer or permit upon the premises conveyed any tenement-house, which covenant it was agreed should run with the land. In an action against one, who through various means conveyances, all of which contained said restriction, had become the owner of a lot in said block, brought by the owner of another lot, used as a private residence, to restrain a violation of the covenant, it was proved that the entire surrounding neighborhood had been mostly built up with flats or tenement-houses; that the tenement-house defendant was building was a large one, and he had expended large sums thereon. The trial court refused a permanent injunction, but fixed the permanent damages, *i. e.*, the difference in value of plaintiff's premises with and without defendant's tenement building, and awarded an injunction restraining the defendant from renting her building to any tenant until such damages and the costs were paid. *Held*, no error; that the court in awarding damages was not confined to those sustained before the commencement of the action.

Pond v. M. E. R. Co. (112 N. Y. 186); *Uline v. N. Y. C. & H. R. R. R. Co.* (101 id. 98), distinguished.

But *held*, that the trial court might properly and should have required plaintiff, upon receipt of the damages awarded, to execute to defendant a release of the covenant.

Reported below, 25 J. & S. 175.

(Argued March 21, 1892; decided April 19, 1892.)

Statement of case.

APPEAL from order of the General Term of the Superior Court of the city of New York, made August 27, 1889, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

W. J. Townsend for appellant. In an equitable action the plaintiff is not limited to loss of rentals, but may recover his full damages in a single action, and the proper measure of such damages is the depreciation in the market value of the property in question. (*Kernochan v. N. Y. E. R. R. Co.*, 128 N. Y. 559; *McGean v. M. R. Co.*, 117 id. 219; *Henderson v. N. Y. C. R. R. Co.*, 78 id. 423; *T. & B. R. Co. v. Lee*, 13 Barb. 169; *Pappenheim v. M. E. R. Co.*, 125 N. Y. 436; *N. Y. N. E. Bank v. M. E. R. Co.*, 21 J. & S. 311.) Conceding all the facts claimed by the defendant, no equitable defense is shown. (*Trustees, etc., v. Thacher*, 37 N. Y. 311.) The defense that, by reason of changes in the neighborhood, the property in question could be profitably improved in no other way, and that it would be inequitable to enforce the restriction, is not supported by the evidence, and the findings of the trial court are correct. (*Latimer v. Livermore*, 72 N. Y. 174; *Trustees, etc., v. Thacher*, 87 id. 311.) Even if the facts as proved would disentitle the plaintiff to equitable relief, yet she is entitled to recover such damages as have resulted from the defendant's breach of her covenant. (*Clark v. R. L. & N. F. R. Co.*, 18 Barb. 350.) The judgment was more favorable to the defendant than she had a right to expect, and was in proper and, in such cases, usual form. (*Van Rensselaer v. Van Rensselaer*, 113 N. Y. 307, 314.)

Cephas Brainerd for respondent. The relation of the parties is this: The restrictive covenant creates an equitable easement in favor of the plaintiff over the defendant's property. The defendant's property is under an equitable servi-

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tude to the plaintiff. The plaintiff claims that this covenant has been violated by the defendant in the erection of the buildings now standing on her land. (Pom. Eq. Juris. §§ 1295, 1342.) The measure of damages cannot be sustained. (*Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; 108 id. 660; *Whitmore v. Bischoff*, 5 Hun, 176; *Matthews v. D. & H. C. Co.*, 20 id. 427; *Ireland v. M. E. R. Co.*, 20 J. & S. 450.) The rule that a covenant which works a hardship to one of the parties will not be specifically performed, or be regarded as ground for damages, is broad enough to protect this defendant. (*C. College v. Thacher*, 87 N. Y. 311; Fry on Spec. Perf. § 397.) It is insisted, on the part of the plaintiff, that the *Columbia College* case was designed to rule that the change which will defeat a restrictive covenant must be one not within the contemplation of the parties when the covenant was made. Such is not the rule. (*Trustees, etc., v. Lynch*, 70 N. Y. 440; 3 Pom. Eq. Juris. § 1295; *Murfeldt v. N. Y., W. S. & B. R. R. Co.*, 102 N. Y. 703; *Duke of Bedford v. British Museum*, 2 M. & K. 552, 573; *Reynolds v. Cowlingshaw*, L. R. [11 Ch. Div.] 868; *Clark v. R. R. R. Co.*, 18 Barb. 350, 355; *Musgrave v. Sherwood*, 56 How. Pr. 338; *Conger v. R. R. Co.*, 120 N. Y. 29, 30; *Chesterfield v. Janssen*, 1 Atk. 301; *Bradford v. R. R. Co.*, 123 N. Y. 316; *Post v. Weil*, 115 id. 361.) Plaintiff was allowed to show, against the defendant's objections and exceptions, that the opinions of a witness as to the effect of a certain class of building, if put on the defendant's lots, as contrasted with the buildings actually there. This should have been excluded. (*Roberts v. M. E. R. Co.*, 128 N. Y. 455.) The General Term has reversed the judgment on facts; this court will not investigate the proof further than to see that there was fair ground for the reversal. (*Gray v. M. R. Co.*, 128 N. Y. 499, 509.)

HAIGHT, J. This action was brought for a permanent injunction, and for damages.

Clarence S. Brown was the former owner of a block of land in the city of New York, bounded on the north by Sixty-fourth

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street, on the east by Ninth avenue, on the south by Sixty-third street, and on the west by Tenth avenue. He made conveyances of separate parts of such block to different parties, all of which conveyances were made subject to certain restrictions and covenants, among which was that the grantee, his heirs and assigns, would not, at any time thereafter, erect, suffer or permit upon the premises thereby conveyed, or any part thereof, any tenement-house; and it was agreed between the parties to such conveyance that such covenants should run with the land.

The defendant, through various mesne conveyances from Brown, under deeds containing the restriction and covenant above mentioned, has become the owner of a lot on the southeast corner of Tenth avenue and Sixty-fourth street; the plaintiff, in like manner, has become the owner of a private residence on the south side of Sixty-fourth street, distant forty-two feet and nine inches easterly from the rear of defendant's lot. Since the purchase by the plaintiff of her residence, the defendant has erected upon her lot a tenement-house in violation of the restriction and covenant alluded to. The building contains a frontage of seventy-five feet on Tenth avenue, and ninety-five feet on Sixty-fourth street. It is arranged for three stores fronting upon the avenue, and three stores fronting upon Sixty-fourth street, with four stories above the first floor, each arranged for the accommodation of four families.

Flat or tenement-houses of the ordinary description have been erected for a considerable distance below Sixty-third street, on both sides of Tenth avenue; also on the opposite side of Tenth avenue, between Sixty-third and Sixty-fourth streets; also upon the entire block fronting on the easterly side of Tenth avenue from Sixty-fourth street to Sixty-fifth street; also in the middle of the block, between Ninth and Tenth avenues on the northerly side of Sixty-third street; ordinary tenement-houses have been built on the southerly side of Sixty-third street from Ninth avenue westwardly, covering more than half of the block; flat or tenement-houses have been built opposite the premises of the plaintiff, on the north-

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erly side of Sixty-fourth street, and like houses have been built for a considerable distance northward on both sides of Tenth avenue. On the north-westerly corner of Tenth avenue and Sixty-fifth street is an establishment for the manufacture of illuminating gas, and on the block below, on the westerly side of Tenth avenue, are carpenter-shops, liquor and beer-saloons, blacksmith-shops, and one tenement or flat-house.

The trial court refused a permanent injunction, but awarded damages to the plaintiff in the sum of fifteen hundred dollars, and an injunction restraining the defendant from renting the building upon her lot to any tenant until such damages, together with the costs of the action, shall be paid.

The facts to which we have alluded were found by the trial court, and are such as to entitle the plaintiff to an injunction were it not for the fact that the surrounding neighborhood has been chiefly built up and occupied with flat or tenement-houses. The defendant's building is a large one; constructed at considerable expense, and is in a neighborhood devoted chiefly to the residence of people for which the defendant's building was designed; if enjoined from using the same for that purpose, the defendant must necessarily suffer damages greatly in excess of any which is likely or possible to be sustained by the plaintiff.

In the case of *Trustees of Columbia College v. Thacher* (87 N. Y. 311), it was held, that whilst a court of equity has jurisdiction to enforce the observance of covenants made by an owner of lands in a city, with an adjoining owner, in consideration of similar reciprocal covenants on the part of the latter, restricting the use of the lands to the purposes of private residences, the exercise of this authority is within its discretion; and where there has been such a change in the character of the neighborhood as to defeat the object and purposes of the agreement, and to render it inequitable to deprive such owner of the privilege of conforming his property to that character, such relief will not be granted.

In *High on Injunctions* (§ 22), it is said, if it is apparent upon an application for an injunction, that the relief sought

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is disproportioned to the nature and extent of the injury sustained, or likely to be sustained, the court will decline to interfere. And again at section 1158, where the character and condition of the adjoining lands, with reference to that conveyed, have so changed as to render the restriction in the conveyance inapplicable, according to its true intent and spirit, a court of equity will not interfere by injunction to prevent a breach of the covenant, but will leave the party aggrieved to his remedy at law.

See also *Conger v. N. Y., West Shore & Buffalo Railroad Company* (120 N. Y. 29); *Margraf v. Muir* (57 id. 155); *Peters v. Delaplaine* (49 id. 362).

Under the rule to which we have called attention, and the facts disclosed, the trial court properly withheld a permanent injunction, and confined the relief of the plaintiff to damages.

As we have seen, the trial court awarded fifteen hundred dollars as damages. This was found to be the difference in value of the plaintiff's premises, with and without the defendant's tenement building. The award is for the permanent injury sustained. The defendant's building was in process of construction when this action was brought. At the time of the trial, it had been completed, but was only partially occupied. The plaintiff's damages depended not upon the construction of the building, but the use made of it. If it should never be used for a tenement building, no damages would result, and if as is claimed, damages only could be awarded to the time the action was commenced, none could be allowed for the reason that at that time, none had been sustained. It appears to have been upon this theory that the General Term ordered the reversal of the judgment, following the cases of *Pond v. Metropolitan El. Railway Co.* (112 N. Y. 186); *Uline v. N. Y. C. & H. R. R. Co.* (101 id. 98), and other kindred cases; but those cases were actions for damages, and were disposed of upon the theory that as to the plaintiff there was an unlawful structure upon his easement, amounting to a nuisance. That being a nuisance, the defendant was under a legal obligation to remove it, and the law would not presume that he

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would not do so. For that reason damages could only be recovered up to the time of the commencement of the action.

We do not regard these cases as having any application to the question under consideration. The defendant's building does not incumber or interfere with any easement of the plaintiff; it is not unlawful or a nuisance. There is consequently no presumption that it will be abated or discontinued. The devoting of it to the use for which it was constructed, operates as a breach of the covenant embraced in the deeds to which we have alluded, and because of such breach, the plaintiff is entitled to damages. The building is a permanent structure, specially arranged for continued use as a tenement or flat-house. This action is in equity, and one of the objects sought is to avoid a multiplicity of actions which might be brought in case only past damages could be recovered.

We see no reason why permanent damages may not be awarded. This right is recognized by the recent cases.

In *Pappenheim v. Met. El. Railway Company* (128 N. Y. 436), PECKHAM, J., in delivering the opinion of the court, says: "In an action at law, the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can only recover the damages which he has sustained up to the commencement of the action. * * * But the owner can resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damages which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey the right to the defendant." (See also *Thompson v. Manhattan Railway Company*, 41 N. Y. S. Rep. 697; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y. 423-434.)

We discover no exceptions in the case that call for a reversal of the judgment. Evidence was received in reference to there being windows on the east end of the building, but it was

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received only for the purpose of showing the kind of house that was erected, and no claim for damages was made by reason of such windows. To the question as to what the effect would have been upon the plaintiff's property, if instead of the house erected by Mrs. Deane there had been placed houses corresponding in quality and character to those which front on Tenth avenue above Sixty-fourth street, the answer of the witness is, that he did not know the character of those houses. He does not pretend to speak as to the effect, and consequently the exception taken is not available. His answer to the next question is in favor of the defendant, and consequently did her no harm.

The damages awarded by the trial court was for the permanent injury sustained by the plaintiff by reason of the breach of the covenant alluded to. Under the practice adopted in kindred cases, the trial court might properly have required the plaintiff, upon the receipt of the damages awarded, to have duly executed, acknowledged and delivered to the defendant a release from the covenant, so far as it restricts the use of the premises for the purpose of a tenement-house. Whilst this requirement may not be necessary to bar a further action for damages, it seems but just, under the circumstances and in view of the liberal award made, that the release should be given.

The order of the General Term will, therefore, be affirmed, and judgment absolute ordered against the appellant *upon her stipulation*, with costs, unless within thirty days she stipulates that the judgment of the trial court be modified, by adding thereto a provision that upon the payment to her of the damages and costs awarded by the trial court she execute, acknowledge and deliver to the defendant a release from the covenant embraced in the deed, so far as it restricts the use of the premises for the purpose of a tenement-house. If such stipulation is given, the order of the General Term is reversed, and the judgment of the trial court, as so modified, is affirmed, without costs.

All concur.

Ordered accordingly.

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THEODORE HAEBLER et al., Appellants, v. ELIJAH MYERS et al.,
Respondents.

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182	363
151	556
132	363
155	140

The provisions of the Code of Civil Procedure (§§ 445, 1005, 1216, 1292, 1323, 2142, 2263, 3058), providing for restitution, on reversal of a judgment or order, of money or property, or its proceeds, of which the appellant has been deprived by reason of the erroneous judgment or order, were enacted in recognition of the common-law right of restitution, and to furnish additional means of enforcing that right.

The remedies prescribed, therefore, are not exclusive, and a party entitled to restitution may obtain relief by action.

By virtue of a levy under an attachment brought by plaintiffs, the sheriff received \$900. Defendants, as subsequent lienors, moved to vacate the attachment and procured an order restraining the sheriff from paying over the money to plaintiffs. The motion to vacate was granted and the sheriff thereupon paid over the money so received to defendants. Upon appeal the order vacating the attachment was reversed and the motion denied. Plaintiffs, pending the appeal, recovered judgment in their attachment suit, an execution thereon was returned wholly unsatisfied and their judgment remains unpaid. *Held*, that an action as for money had and received was maintainable to recover the moneys so paid to defendants; that the right of action was not affected by the fact that at the time the money was paid over to defendants, plaintiffs had only a lien upon it; that while the erroneous order was a protection to the sheriff, it was not such to defendants; that they having received the money with knowledge of the facts, and that if the order by virtue of which they received it should be reversed, plaintiffs would be entitled to it, a promise of restitution would be implied, running to plaintiffs, who could enforce it without the intervention of the sheriff.

Haebler v. Myers (58 Hun, 179), reversed.

(Argued March 21, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 24, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This was an action for money had and received.

In April, 1888, the sheriff of the city and county of New York received the sum of \$900 "by reason of" the levy of

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an attachment which the plaintiffs had caused to be issued in an action brought by them against one Bernharth and others. On October thirtieth, the defendants, "as subsequent lienors," procured an order restraining the sheriff from paying over to the plaintiffs the money so received by him, and on November twenty-second, they procured another order, granted at Special Term on notice, vacating said attachment. "After said attachment was so vacated, and in consequence thereof and not otherwise, said sheriff paid over to the defendants, as subsequent lienors, said \$900 which he had received under the attachment issued to him, as aforesaid, by the plaintiffs." On the 18th of April, 1889, the order vacating the attachment was affirmed by the General Term, but on October 31, 1889, the Court of Appeals reversed the orders made by the General and Special Terms and denied the motion to vacate the attachment.

November 12, 1888, the plaintiffs recovered judgment in the action brought by them against said Bernharth and others for the sum of \$1,258.91, but the execution issued thereon to said sheriff was returned wholly unsatisfied and the judgment is still unpaid. The plaintiffs demanded restitution from the defendants, which was refused, and thereupon they brought this action, and after alleging the foregoing facts, in substance, asked that the defendants be ordered and decreed to make restitution to the plaintiffs of the said sum of \$900, with interest thereon from the 22d day of November, 1888.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The Special Term, in sustaining the demurrer, held that the defendants had received nothing from the plaintiffs, which they were bound to restore to them, as the money in question belonged to Bernharth and others until it was devoted to the payment of the defendants' execution. The General Term affirmed the judgment upon the same ground, but also suggested that it was the duty of the plaintiffs to obtain a stay of proceedings, if they wished to protect their lien by a successful appeal.

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Marshall P. Stafford for appellants. An action for restitution always lies against a party who has obtained money by reason of an order or judgment subsequently reversed. (*Kidd v. Curry*, 29 Hun, 215; *Clark v. Pinny*, 6 Cow. 297; *Sturgis v. Allis*, 10 Wend. 364; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Lott v. Swezey*, 29 Barb. 88; *Murray v. Berdell*, 98 N. Y. 480; *Wright v. Nostrand*, 100 id. 616.) One who has been wrongfully deprived of money always has an action for money had and received against one who has profited by the wrong. (*Barhyte v. Shepard*, 35 N. Y. 238; *Swift v. City of P.*, 37 id. 513; *Bank of Commonwealth v. Mayor*, 43 id. 184; *Newman v. Bd. Suprs.*, 45 id. 676; *Peyser v. Mayor, etc.*, 70 id. 497; *Cahill v. Palmer*, 45 id. 479; *DePeyster v. Mali*, 92 id. 262; *Kingston Bank v. Eltinge*, 40 id. 391.) Whoever has money, which in justice and good conscience he ought not to keep, is liable to an action for money had and received at the instance of one who ought to have had such money. (*Hathaway v. Town of Cincinnati*, 62 N. Y. 447.) The sheriff was not a necessary party to this action. (*Mason v. Pendergast*, 120 N. Y. 539; *Stall v. Wilbur*, 77 id. 163, 164; *Horn v. Town of New Lots*, 83 id. 100; *Hathaway v. Town of Cincinnati*, 62 id. 447.) It is immaterial that the sheriff rightfully paid the money to appellants. (*Bank of Commonwealth v. Mayor, etc.*, 43 N. Y. 184; *Newman v. Bd. Suprs.*, 45 id. 687.) The respondents were parties to the record in the proceeding which did the wrong. (*Bank of U. S. v. Bank of Washington*, 6 Pet. 17.) The action was properly brought against the respondents. (*Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Bank of Commonwealth v. Mayor, etc.*, 43 N. Y. 184; *Newman v. Bd. Suprs.*, 45 id. 676; *Murray v. Berdell*, 98 id. 483.) The reversal of the vacating order revived the attachment and left it in full force. (*Pach v. Gilbert*, 124 N. Y. 612.) The facts stated in the complaint make a good cause of action. (*Caperton v. McCorkle*, 5 Gratt. 177.)

Michael H. Cardozo for respondents. An action for restitution cannot be maintained under the provisions of the Code

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of Civil Procedure. (Code Civ. Pro. § 1623.) In this case, there is absolutely nothing to show that there was any privity between the plaintiffs and the defendants in the receipt of this money, and in view of the circumstances under which the defendants received this money, an action for money had and received cannot be maintained. (*Cary v. Curtis*, 3 How. [U. S.] 236; *Patrick v. Metcalf*, 37 N. Y. 332; 9 Bosw. 483; *Butterworth v. Gould*, 41 N. Y. 450; *Peckham v. Van Wagenen*, 83 id. 40; *K. Bank v. Eltinge*, 40 id. 391; *Roberts v. Ely*, 113 id. 128; *Carver v. Creque*, 48 N. Y. 385; 46 Barb. 507; *Garr v. Martin*, 20 N. Y. 306.) The attachment having been once discharged, it could not be revived, except by an application for a warrant, and consequently a new exercise of judicial discretion. (*Wood v. Dwight*, 7 Johns. Ch. 296; *People v. Bowe*, 81 N. Y. 43; *Bowman v. Bow*, 40 Hun, 489; *Wilson v. Ryder*, 13 Civ. Pro. Rep. 69; *Arnold v. Thomas*, 2 How. Pr. 91.)

VANN, J. Restitution was a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid."

A writ of restitution was thereupon issued, provided the amount that the appellant had lost, or paid under compulsion, appeared of record, as by the return of an execution satisfied. Otherwise process in the nature of an order to show cause was first issued, known as a *scire facias quare restitutionem habere non debet*. (Tomlin's Law Dict. title Restitution; 2 Till. Abr. 472; Rolle Abr. 778; *Westerne v. Creswick*, 4 Mod. 161;

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Wilkinson's Case, Cro. Eliz. 465; *Goodyere v. Ince*, Cro. Jac. 246; *Manning's Case*, 4 Coke, 94; 2 Tidds. Pk. 1033; 1 Burrill Pk. 292.)

In this state the practice is now regulated by statute and almost every conceivable case is provided for. (Code Civ. Pro. §§ 445, 1005, 1216, 1292, 1323, 2142, 2263 and 3058.) Section 1323 seems especially adapted to the facts set forth in the complaint, as it provides that "where a final judgment or order is reversed or modified upon appeal, the appellate court * * * may make or compel restitution of property, or of a right, lost by means of the erroneous judgment or order." This is a part of section 330 of the Code of Procedure, under which it was held that the power conferred was cumulative and did not take away the common-law rights of a successful appellant. (*Lott v. Swezey*, 29 Barb. 87, 88.) There were earlier, though less complete statutes upon the subject. (L. 1832, ch. 128, § 1; 2 R. S. 509, § 13; 1 R. L. 96, §§ 2 and 5.)

The statutory remedy is exercised by the entry of a judgment or order in the action in which the erroneous judgment or order was rendered or made. We think that the remedies provided by statute are not exclusive and that they were enacted in recognition of the right of restitution as it existed at common law, to furnish additional means of enforcing that right.

We have before us an effort to procure restitution by an independent action in the nature of *indebitatus assumpsit*, based upon the theory that the law will imply a promise from the conduct of the defendants and the circumstances of the case. It has been repeatedly held that such an action will lie to recover back money paid on a judgment pending an appeal which resulted in a reversal. The subject was carefully examined in *Clark v. Pinney* (6 Cow. 298), where it was held that the court would not compel the party to resort to the antiquated remedy of *scire facias*, but would permit a recovery by a direct action, as for money had and received. In delivering the opinion, Chief Justice SAVAGE said: "The general proposition is that this action lies in all cases where the defendant

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has in his hands money which, *ex æquo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected." This principle was recognized by the Supreme Court of the United States in *United States Bank v. Bank of Washington* (6 Peters, 8), where it was declared that "on the reversal of a judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost," and that he might proceed by action, *scire facias*, or order. The authorities uniformly support this position and out of many that might be cited the following are sufficient to illustrate the subject: (*Sturges v. Allis*, 10 Wend. 355; *Maghee v. Kellogg*, 24 id. 32; *Norton v. Coons*, 3 Den. 130; *Langley v. Warner*, 1 Sandf. 209; *Lott v. Sweezy*, *supra*; *Kidd v. Curry*, 29 Hun, 215; *Wright v. Nostrand*, 100 N. Y. 616; *Traveler's Ins. Co. v. Heath*, 95 Penn. 333.)

The right of the plaintiffs to recover could hardly be questioned if the money had absolutely belonged to them when it was paid by the sheriff to the defendants, but inasmuch as they only had a lien upon it and had not then completed their title, it is claimed that no action will lie for their relief. In taking this position the defendants lose sight of the fact that a lien is property in the broad sense of that word, and although it has no physical existence it exists by operation of law so effectively as to have pecuniary value, and to be capable of being bought and sold. They also ignore the proceedings that were in progress to convert the lien into a title to the fund. This makes the successful prosecution of the appeal a barren victory and enables the party in fault to retain the fruits of his own wrong.

While the erroneous order was a protection to the sheriff, who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal, and became, as to them, the same as if it had never been made.

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When they accepted the money that was paid over in consequence of the order that they procured, they knew that if the order should be reversed and their motion denied, they would no longer be entitled to it, and could not in fairness retain it. They also knew that if, in the meantime, the plaintiffs perfected judgment and issued execution, their right to the money, if not paid over, would be complete upon a reversal of the order. As they acted with knowledge of all the facts, it would be inequitable for them to retain money received under such circumstances, and we see no reason why the law should not infer a promise of restitution the same as if the money had been collected under an execution. In either case the inference rests upon the fact that money was received by those who knew at the time that it might ultimately be decided that they were not entitled to it. But to whom did the implied promise run? Obviously to those who would have been entitled to the money upon the reversal of the order, provided it had not been paid to the defendants. It was so held in *Camerton v. McCarkle* (15 Grat. 177), which is precisely in point. The law implies the promise for the benefit of the injured party, and if the situation were the same as it was when the money was paid, repayment to the sheriff would be required, because he would be entitled to possession of the fund under the restored attachment. (*Pach v. Gilbert*, 124 N. Y. 612.) But the situation is changed, as the plaintiffs have become entitled to the money by virtue of their judgment and execution. They, and they alone; therefore, can avail themselves of the implied promise, which is plastic in character and for the benefit of whom it may concern. The law implies a promise because in equity and good conscience the defendants ought to have promised, and it will not permit them to say that they did not. It would be an anomaly to hold that the law will imply a promise in favor of one having title, but not in favor of one holding the first lien, when through the action of agencies known by the parties to be in operation and in the ordinary course of legal procedure, the lien would have ripened into a title, but for the erroneous order. The defendants pro-

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cured the order and acted upon it, and thereby obtained money that did not belong to them, and, under such circumstances, the law presumes that they engaged to do what reason and justice require them to do. They are, therefore, under an obligation to restore the money. In enforcing that obligation, the courts will not be particular to require literal restitution to the sheriff, or late sheriff, but, as the plaintiffs have now become entitled to the fund, will permit them to recover it in a direct action for money had and received. By imputation of law, the defendants received the money for the benefit of the party ultimately entitled to it, and by refusing to pay it over to that party, upon a proper demand after his rights had matured, became liable to an action for the recovery thereof. (*Mason v. Prendergast*, 120 N. Y. 536.)

The suggestion that the plaintiffs should have procured a stay of proceedings is not entitled to much weight, because a stay by order is not a matter of right, while a stay by undertaking upon appealing from a judgment is a matter of right, yet the omission to give an undertaking does not prevent a recovery upon a reversal of the judgment.

We think that the judgments rendered by the courts below should be reversed and the demurrer overruled, with costs in all courts, with leave to the defendants to answer over in twenty days upon payment of costs.

All concur.

Judgment reversed.

JEROME J. GALLUP, Appellant, v. JACOB BERND, Respondent.

In an action, commenced in 1887, to recover an alleged balance unpaid of the purchase-price of a farm sold and conveyed in 1880, by plaintiff, to defendant, defendant set up as a counter-claim, and the referee found in substance that the sale was by the acre, that plaintiff represented that there were 230 acres in the farm, and relying thereon he agreed to pay for that number, that shortly before the commencement of the action he discovered that there were only about 211 acres. The referee found that the agreement was the result of a mutual mistake. Defendant demanded a reformation of the contract and an allowance for the deficiency. *Held*, that defendant was entitled to the relief sought.

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Plaintiff in reply to the counter-claim pleaded the Statute of Limitations.

Held, untenable; that the contract having been executed, defendant had no relief except in equity, and that the ten years limitation applied.

Also *held*, that the correction of the mistake sought for could be made as well upon answer, as in a suit brought directly for that purpose.

(Argued March 21, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This was an action to recover the balance remaining unpaid of the purchase-price of a farm sold by plaintiff to defendant.

The facts, so far as material, are stated in the prevailing opinion.

E. A. Washburn for appellant. The allegation in the answer is one of active fraud against the plaintiff and of ignorance on the part of the defendant. If, therefore, the recovery was had on the ground of mutual mistake it cannot be sustained, as where a complaint is for fraud the action cannot be maintained on the ground of mutual mistake. (*McMichael v. Kilmer*, 76 N. Y. 36, 40; *Fisher v. Rankin*, 27 N. Y. S. R. 582.) As to the 10 $\frac{3}{4}$ acres of land known as the Bidwell land designated as No. 2 on the map annexed to the case, the six year statute of limitation has barred the defendant's right to recover. (*Miller v. Wood*, 41 Hun, 600; 116 N. Y. 351.) The referee erred in the basis adopted by him as the rule of damages in this action. (*Hill v. Buckley*, 17 Ves. 395; *Paine v. Upton*, 87 N. Y. 332; Pom. on Spec. Perf. § 439; 1 Story's Eq. Juris. § 779; *Rankin v. Atherton*, 3 Paige, 145.)

Myron H. Peck for respondent. A complete cause of action in favor of the defendant on account of the breach of warranty contained in the plaintiff's deed and the defendant's damages arising therefrom was proved on said trial. (Code Civ. Pro. § 381; *F. Co. v. Hersee*, 103 N. Y. 25; *Waring v. Somborne*, 2 id. 604.) If it had been deemed necessary the

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contract between the parties to this action could have been reformed because of the mistake of the parties as to the quantity of land, so as to express the true intent and meaning as to the consideration to be paid, and a claim for relief on the ground of mistake is not barred until ten years after the cause of action accrues. (Code Civ. Pro. § 388; *Salisbury v. Morse*, 7 Lans. 359; 55 N. Y. 675; *Oakes v. Howell*, 27 How. Pr. 145.) A cause of action to procure a judgment, other than for a sum of money, on the ground of fraud, which, etc., was cognizable by the Court of Chancery, shall not be deemed to have accrued until the discovery of the facts constituting the fraud. (*Curr v. Thompson*, 87 N. Y. 160; *Bosley v. N. M. Co.*, 123 id. 550.) So long as the plaintiff could legally demand payment of the balance due upon the purchase of his farm, just so long could the defendant be heard in his defense that by reason of mistake, or fraud upon the part of the plaintiff, in the agreement originally made between the parties, and out of which springs the rights of the plaintiff, there is not the amount claimed due and owing to the plaintiff. (Code Civ. Pro. § 397; *Herbert v. Herbert*, 33 Hun, 461; *Ord v. Ruspini*, 2 Esp. 569; *Hunt v. Spaulding*, 18 Pick. 521; *Maders v. Lawrence*, 49 Hun, 360; *Wood on Lim.* 602; *Schoener v. Lissauer*, 107 N. Y. 111, 117.) It is only necessary to entitle the defendant to the benefit of his right of set-off that his claim must in some way tend to diminish or defeat the plaintiff's recovery, and must be a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (Code Civ. Pro. § 501; *Harlock v. Le Baron*, 1 Daly, 168; *G. & H. M. Co. v. Hall*, 61 N. Y. 226; *Elwell v. Skidd*, 77 id. 282; *Grange v. Gilbert*, 44 Hun, 9; 58 id. 372; *Thompson v. Sanders*, 118 N. Y. 252; *Richards v. Tourette*, 119 id. 54; *Sampson v. Freedman*, 102 id. 699; *Waring v. Sonborn*, 82 id. 604; *Avery v. Brown*, 31 Conn. 398; *Disbrow v. Harris*, 122 N. Y. 362.) The position of the plaintiff at the Circuit that the defendant, having taken possession of the land conveyed to him, and being still in possession, cannot avail

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himself of the fraud of the plaintiff in the sale is untenable. (*Lamerson v. Marvin*, 9 Barb. 9; *Wright v. Delafield*, 23 id. 498; *Lewis v. McMullen*, 41 id. 420; *Whitney v. Lewis*, 21 Wend. 131; *Krumm v. Beach*, 96 N. Y. 398, 407.) A vendor of real estate is guilty of a fraud if, knowing that he has no title to a portion of the lands sold, he willfully suppresses that fact from the purchaser. (*Clark v. Baird*, 9 N. Y. 183; *Thomas v. Beebe*, 25 id. 244; *Stokes v. Johnson*, 57 id. 673; *Beardsley v. Dunthy*, 69 id. 577.) The general jurisdiction of a court of equity to set aside or reform a contract on the ground of mistake includes executed as well as executory contracts. (*Paine v. Upton*, 87 N. Y. 327; *Belknap v. Seeley*, 14 id. 143.) The defendant may recoup against the claim of the plaintiff the damages which he sustained by reason of the failure of the title of the premises conveyed to him by the plaintiff. (*Hunt v. Chapman*, 51 N. Y. 555; *Isham v. Davidson*, 52 id. 237; *Waring v. Somborn*, 82 id. 604; *Whitney v. Allaire*, 4 Den. 554; 1 N. Y. 305; 96 id. 398.) There was sufficient eviction of the defendant from the two pieces which plaintiff conveyed to defendant, and included in the land described in the deed to make the 230 acres, and which plaintiff did not own at the time of the conveyance to make him liable on his covenant of warranty of quiet and peaceable possession to the defendant of the lands thus conveyed. (*Shattuck v. Lamb*, 65 N. Y. 499; *Schriner v. Smith*, 100 id. 471.) A court of equity will afford relief in a proper case whether it be upon the ground of mistake or fraud, or a combination of both. (*Croce v. Lewin*, 95 N. Y. 423; *Waring v. Somborn*, 82 id. 604; *Bloodgood v. Sears*, 64 Barb. 71; *Sheffield v. Hamlin*, 26 Hun, 237.) In this case the defendant had a right to insist that there was a failure of consideration to the extent of the value of the property not received by him under the deed, and thereby diminish the claim of the plaintiff in this case. (6 Wait's Act. & Def. 582; *Sawyer v. Chambers*, 44 Barb. 42; *McAllister v. Reap*, 4 Wend. 485; *Patterson v. Hulings*, 10 Penn. St. 506; *Blessing v. Miller*, 102 id. 45.)

PARKER, J. The defendant purchased from plaintiff a farm, part of the consideration being secured by a bond and mortgage.

Subsequently the bond and mortgage was satisfied, the defendant paying amount due less \$1,364.98. He had agreed to pay all but \$800, and to give his note for that amount.

But the money with which the payment on the bond and mortgage was made, was borrowed from a savings bank, and the investigation instituted by that institution for the purpose of ascertaining the character of the title tendered and the value of the property, led to a survey which disclosed that defendant, instead of having granted to him over two hundred and thirty acres, was the grantee of only two hundred and eleven and three-one-hundredths acres. Defendant then demanded from his grantor an appropriate allowance because of the lessened acreage.

The demand was refused; defendant declined to pay the \$1,364.98, or any part of it; plaintiff commenced this action to recover such sum; defendant, in his answer, alleged misrepresentation on the part of the vendor as to the number of acres; his reliance thereon, and demanded among other relief, a reformation of the agreement, so that the consideration expressed should conform to the amount actually due, and a dismissal of the complaint.

On the trial, the referee found that the sale was by the acre; the representation complained of made; reliance placed thereon by the defendant; his failure to discover the truth until shortly before the commencement of this action, and that defendant is entitled to an abatement from the expressed purchase-price, in an amount equal to the sum which the plaintiff claimed to recover, and directed a dismissal of the complaint. The facts found, and which come to us approved by the General Term, except in so far as they may be said to involve a consideration of the Statute of Limitations, are in all essential respects like those in *Paine v. Upton* (87 N. Y. 327), and, therefore, need not be discussed.

Opinion of the Court, per PARKER, J.

In his reply to the counter-claim set up in defendant's answer, the plaintiff pleaded the Statute of Limitations.

It appears that the deed was executed and delivered January 5, 1880; plaintiff's discovery of the error in acreage occurred later than March 1, 1887, and this action was commenced about June 17, 1887.

On the first trial, judgment was directed in favor of the plaintiff, and in stating the reasons for reversing the judgment, the General Term assumed the six year limitation to be applicable, but treated the suit as one in equity to recover a judgment other than for a sum of money on the ground of fraud, and, therefore, held that the statute did not commence to run until the discovery of the fraud.

But the findings of the referee on the retrial, which are now before us, as we understand them, do not charge fraud on the part of the plaintiff, but rather that while the representations complained of were made to the defendant by the plaintiff, they were mistakenly made, and that the agreement which ripened into a conveyance by which the plaintiff undertook to convey, and the defendant agreed to pay for, a greater number of acres than was in fact conveyed, resulted from a mutual mistake of fact. In *Paine's* case, as here, the deed had been executed and delivered, and a bond and mortgage given for a portion of the purchase-price before the mistake in the acreage recited in the deed was discovered by the grantee, and the court, in a carefully considered opinion delivered by ANDREWS, Ch. J., held that the general jurisdiction of a court of equity to reform written instruments is not limited to executory contracts; that the power should be exercised with great caution when invoked on the ground of mistake. But such considerations address themselves to the chancellor in the exercise of the jurisdiction, and ought not to prevent the interference of equity when the proper occasion for interference arises.

The relief afforded in that case was by way of abatement of the consideration expressed, which was deducted from the sum secured by the bond and mortgage given for the purchase-price,

Dissenting opinion, per FOLLETT, Ch. J.

In the case before us, the court has decreed an abatement equal to the balance of the purchase-price remaining unpaid. Now, it is clear that the defendant had no remedy at law. The contract was executed; was not procured through fraud, and in law the parties were bound by it. Equity having a broader jurisdiction, could open the written contract even after it became executed, to let in an equity and correct an error resulting from mistake.

Such correction could be made as well upon an equitable defense set up in an answer as in suit brought directly for that purpose. (*Hook v. Craighead*, 32 Mo. 405.)

As this is a case in which before the Code equity had exclusive jurisdiction, the ten year limitation applies. (*Butler v. Johnson*, 111 N. Y. 204.)

The judgment should be affirmed.

FOLLETT, Ch. J. (dissenting). It is alleged in the answer that: "The plaintiff *falsely* stated and represented to the defendant that said lands contained in the aggregate 230 acres of land, and that the same would, if properly surveyed and measured, exceed that amount." Also that the defendant relied on the representation and was induced thereby to purchase the farm, take the deed and execute and deliver to the plaintiff the bond and mortgage to secure \$11,700. The referee found that the representation was made and that the defendant relied upon it, but he refused to find that it was fraudulently made. The finding is in this language: "I further find that by the mutual mistake *or* false representation of the plaintiff and without *laches* on his part, he (defendant), paid and agreed to pay the plaintiff for 18 $\frac{11}{17}$ acres of land, which were not conveyed to him by the plaintiff." As a conclusion of law the referee decided: "I find that by reason of the mistake made in the quantity of land sold and conveyed by the plaintiff to the defendant there is nothing due from the defendant to the plaintiff." Assuming that the word "falsely" in the answer is used as a synonym for fraudulently, and that the word "false" in the decision is used in

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that sense, there is no finding that the plaintiff fraudulently misrepresented the quantity of land contained in his farm.

When a complaint alleges fraud, and only that, a judgment for the plaintiff on the ground of mistake cannot be sustained. (*McMichael v. Kilmer*, 76 N. Y. 36; *Dudley v. Scranton*, 57 id. 424.) The answer contains no allegation that the original contract of purchase and sale, the deed and mortgage executed pursuant to it, or the oral agreement of April 21, 1887, sued on, were, or that either was, entered into under a mutual mistake of fact. The answer asks for a reformation of the oral agreement of April 21, 1887, to pay \$1,364.98, but it is not alleged that it was entered into under a mutual mistake of any fact, nor does the referee find that this agreement was entered into under a mutual mistake of fact. The defendant must prevail according to the case made by his answer or not at all. (*Wright v. Delafield*, 25 N. Y. 266; *Day v. Town of New Lots*, 107 id. 148; Abb. T. Brief Pldgs. § 1027.) I am unable to see that any equitable defense is interposed in the answer or established by the decision of the referee. A legal cause of action for the recovery of money only is stated in the complaint, and a legal counter-claim is stated in the answer which, unfortunately, is barred by the Statute of Limitations. (Code C. P. § 397.) I regret that I cannot see my way clear to concur in the equitable result reached by the prevailing opinion.

I think the judgment should be reversed and a new trial granted.

All concur with PARKER, J., except FOLLETT, Ch. J., dissenting, and HAIGHT, J., not voting.

Judgment affirmed.

Statement of case.

182 878

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156 683

182 878

159 425

AGNES RONALD, Appellant, v. MUTUAL RESERVE FUND LIFE ASSOCIATION, Respondent.

In the absence of any agreement, a waiver of forfeiture of a policy of life insurance results only from negotiations or transactions with the insured, by which the insurer after knowledge of the forfeiture recognizes the continued existence of the policy, or does acts based thereon, or requires the insured by virtue thereof, to do some act or incur some expense or trouble.

In an action upon a policy or certificate of insurance, issued by defendant upon the life of R., these facts appeared: Defendant's constitution, which, by the terms of the policy, is made part of the contract, provides that if any of the conditions of the certificate or of the constitution are violated by a member, the membership shall at once cease and the certificate be void; with power in the executive committee to reinstate the delinquent member "upon satisfactory evidence of good health." After expiration of the time for payment of annual dues, G.'s employer, at his request, paid to defendant such dues, stating that R. had a swollen foot and had been on "his annual spree;" he received a receipt therefor, which stated that as the time for payment had expired, the receipt was given on condition that the member was at the time "in as good health as when received as a member;" otherwise that the payment and receipt should be null and void. R. was at the time sick of a disease of which he died the next day. *Held*, that the forfeiture was not waived by the payment.

Two days after the death defendant was informed thereof, and it furnished blanks for proofs of death, which were filled out and delivered to its representative, who said he would lay them before the proper board; these proofs stated the true cause of the death. Subsequently said representative furnished blanks for the certificate of the clergyman who presided at R.'s funeral, which was procured and delivered to said representative, who stated that when defendant's president, who was then absent, returned, the board would meet, the claim be passed and probably paid, but subsequently when called upon by plaintiff's agent, he said the policy had lapsed for non-payment of dues and defendant tendered back the dues so paid. *Held*, that there was no waiver, or evidence tending to prove it, authorizing the submission of the question to the jury.

As mutual benefit life associations, incorporated under the act of 1883 (Chap. 175, Laws of 1883) are, by the terms of that act (§ 5), declared to be subject only to its provisions, they are not subject to the provisions of the act requiring notice of annual dues to be given in advance of the time when they fell due. (Chap. 341, Laws of 1876, as amended by chap. 321, Laws of 1877.)

(Argued March 21, 1892; decided April 19, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 12, 1889, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

This was an action upon a certificate of insurance issued by defendant upon the life of George Ronald, deceased.

The facts, so far as material, are stated in the opinion.

Charles B. Meyer for appellant. The defendant could waive the forfeiture of Ronald's policy. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 419; *Roby v. Ins. Co.*, 120 id. 510; *Johnson v. S. M. L. Ins. Co.*, 79 Ky. 404; *A. M. A. Society v. Quire*, 8 Ky. L. R. 107; *N. M. B. Assn. v. Jones*, Id. 623; *Robinson v. P. F. I. Co.*, 18 Hun, 395; *Cumberland v. Schell*, 29 Penn. St. 37; *Mershon v. N. Ins. Co.*, 34 Iowa, 87; *S. Ins. Co. v. Fay*, 22 Mich. 467; *Supple v. Cann*, 9 Ir. Law [N. S.] 1.) The forfeiture of George Ronald's certificate was waived by the defendant association on September 26, 1884, the day preceding Ronald's death, by the acceptance of \$10, his annual dues. (*Hodson v. G. L. I. Co.*, 97 Mass. 144; *F. M. F. I. Co. v. Bowen*, 40 Mich. 149.) If it can be said that the receipt establishes that the payment of the annual dues was made upon the conditions therein expressed, nevertheless these conditions would be inoperative, because the attention of Hardenbergh, upon accepting the receipt, was not called to them, and he did not read them. (*Blossom v. Dodd*, 43 N. Y. 265; *Rawson v. P. R. R. Co.*, 48 id. 216; *Madden v. Sherrard*, 73 id. 331; *Isaacs v. N. Y. C. & H. R. R. Co.*, 94 id. 286.) If the receipt, by its terms, purported to constitute the payment of the \$10 annual dues a conditional payment, nevertheless these conditions would be inoperative. (*Hoffman v. Supreme Council*, 35 Fed. Rep. 252; *Rivara v. Q. Ins. Co.*, 62 Miss. 729; *Rennier v. Ins. Co.*, 74 Wis. 96; Bacon on Ben. Soc. § 429.) If, however, the payment and acceptance of the \$10 on September 26, 1884, shall be deemed to have been conditional, and the failure of conditions pre-

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vented the reinstatement of the lapsed policy, or the waiver of forfeiture thereof, nevertheless such forfeiture was subsequently waived by requesting and accepting proofs of death after there had been communicated to the association the fact that the alleged conditions mentioned in the receipt had not and could not be fulfilled. (*Bigelow on Est.* 578; *Roby v. Ins. Co.*, 120 N. Y. 510; *P. Ins. Co. v. Kittle*, 39 Mich. 51; *Cannon v. H. Ins. Co.*, 53 Wis. 587; *Goodwin v. M. M. Ins. Co.*, 73 N. Y. 493; *Prentice v. K. Ins. Co.*, 77 id. 483; *Brink v. H. Ins. Co.*, 80 id. 109.) The forfeiture, if not already waived, was waived subsequently by the request for and acceptance of the second proofs of death. (*Canada v. Canada*, 17 Grant [U. C.] 423.) The payment of the dues was not required to be made by George Ronald or his duly constituted agent. (*G. M. Ins. Co. v. Wolf*, 95 U. S. 326; *Howell v. K. Ins. Co.*, 44 N. Y. 281.) The court erred in refusing plaintiff's request to submit to the jury the question whether the defendant intended, by its several acts, to waive the forfeiture. (*Tripp v. V. L. Ins. Co.*, 55 Vt. 100; *Rockwell v. M. L. Ins. Co.*, 20 Wis. 335; *United Brethren v. Schwartz*, 13 Atl. Rep. 769; *Cobbs v. Fire Assn.*, 36 N. W. Rep. 222; *Dennis v. M. B. Assn.*, 47 Hun, 338.)

Raphael J. Moses, Jr., and *Frederick A. Burnham* for respondent. There was no waiver by the association of the forfeiture resulting from non-payment of dues in August, 1884. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 419; *Graham v. F. Ins. Co.*, 9 Daly, 341; 87 N. Y. 69; *Viele v. G. Ins. Co.*, 26 Iowa, 9; *Robertson v. M. L. Ins. Co.*, 88 N. Y. 541; *Weed v. L. & L. F. Ins. Co.*, 116 id. 106.) The question of waiver is not presented by the issues framed by the pleadings, and, therefore, plaintiff was not entitled to have that question submitted to the jury. (*Kelly v. Upton*, 5 Duer, 336, 342; *Shultz v. Dupuy*, 3 Abb. Pr. 252; *Garvey v. Fowler*, 4 Sandf. 665; *McKyring v. Bull*, 16 N. Y. 297, 304; *Weaver v. Barden*, 49 id. 286.) The payment of dues September 26, Ronald being then dying in the hospital, was an

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attempt to commit a fraud upon the defendant. (*Marshall v. W. Ins. Co.*, 26 J. & S. 606.) No notice was necessary to enable defendant to claim a forfeiture of Ronald's policy. (Laws of 1883, chap. 175, § 5.)

LONDON, J. The plaintiff was the wife of George Ronald, and the beneficiary named in the certificate or policy of insurance upon his life in the sum of \$5,000, issued to him by the defendant August 23, 1883. She seeks to recover that sum in this action. The defense is that the policy was forfeited by the non-payment of ten dollars, annual dues, which by the terms of the policy became due August 21, 1884. The plaintiff claims that this cause of forfeiture was waived by the defendant, and the question presented upon this appeal is whether the facts hereinafter stated constituted such waiver, or were sufficient to entitle the plaintiff to go to the jury upon the question.

George Ronald died September 26, 1884, of fatty degeneration of the heart. The day before he died, Mathew Hardenbergh, his employer, acting for him, paid the defendant the ten dollars, and the defendant thereupon gave him a receipt therefor, the material parts of which are:

"NEW YORK, *Sept. 26*, 1884.

"Received for the annual dues, ten dollars, according to the terms and conditions of certificate No. 14744, on the life of George Ronald, from the 21st day of August, 1884, to the 21st day of August, 1885." "The time having expired for the payment of the annual dues, and payment being tendered after the same was due, this receipt is given by the association, and accepted by the member upon the following conditions and not otherwise: That said member is now living, and of temperate habits, and in as good health as when originally received as a member of this association under said certificate, otherwise said payment and this receipt and said certificate shall be null and void." The constitution of defendant, which formed part of the contract of insurance, provided: "If any of the conditions or provisions of the certificate of member-

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ship or of the constitution and by-laws are violated by the member, then, and in every such case such membership shall at once cease and determine, and the certificate shall be null and void and all payments made thereof forfeited to the association."

"But the executive committee shall have power to reinstate a delinquent member, at any time within one year, for good cause shown and upon satisfactory evidence of good health, and upon payment of all delinquent dues and assessments." The condition respecting the health of the insured expressed in the receipt was within the terms of the contract. The parties had agreed that Ronald's membership should cease upon non-payment of dues. It was competent for them so to agree. (*Atty.-Gen. v. North Am. Life Ins. Co.*, 82 N. Y. 172-190.) But they had also agreed that Ronald might be reinstated in membership upon certain conditions; one was payment of delinquent dues, and another was upon satisfactory evidence of good health. The first condition was met; the second remained to be met. When Hardenbergh paid the dues, the defendant's representative asked him if Ronald was in his usual health; Hardenbergh replied that he knew nothing to the contrary. He testified: "I explained to him about his foot; something about a swollen foot, I remember I said something about his drinking, that he might have got his foot hurt on his annual little spree that he generally took. I was under the impression that that was the case."

It appeared that Ronald had been ill about ten days; it subsequently appeared that his mortal illness was not the result of drink. He was at his boarding-house and had some money to his credit with his employers and at his request they paid the defendant. The same evening they removed him to the hospital where he died the next forenoon. His death was unexpected to them and the cause of it was not known until the post-mortem examination disclosed it to be fatty degeneration of the heart.

It is obvious upon this state of facts that no "satisfactory evidence of good health" — the second condition of Ronald's

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reinstatement to membership — could be furnished. Possibly he was dying when the defendant received the delinquent dues.

The plaintiff further insists that the defendant by its subsequent action in respect to the proofs of death treated the policy as valid and thereby waived the forfeiture. Two days after Ronald's death Mr. Hardenbergh informed the defendant of the fact, but stated that he could not tell the cause of death, except that he was taken home the week before with a swollen foot, and had been taken to the hospital the night before he died, and that he had been upon a spree. The defendant gave Hardenbergh blanks upon which to make proofs of death. Mr. Hardenbergh subsequently had these blanks filled out, a representative of the defendant giving instructions as to the manner, and they were sent to Scotland, where the plaintiff resided, and were executed, returned and delivered to the representative of the defendant, who said they would be laid before the proper board. These proofs stated the true cause of death and that it was preceded by an illness of about two weeks. Subsequently Mr. Hardenbergh, who had been authorized to act for the plaintiff, called upon defendant's representative, who then asked him to furnish the certificate of the clergyman who officiated at Ronald's burial, and the representative gave him blanks for the purpose. This certificate Hardenbergh procured and delivered to the same representative, who thereupon said he would lay it before the board, and that when the president, who was then absent, returned, the board would meet and the claim be passed and probably would be paid in March following. Hardenbergh then stated more fully the facts relating to Ronald's death. Subsequently Hardenbergh again called upon defendant's representative, and then was told that the plaintiff had no claim; that the policy had lapsed because of non-payment of dues. Subsequently the defendant tendered Hardenbergh ten dollars and the interest from September 26, 1884.

We do not think these acts of the defendant constituted a waiver. A waiver of the forfeiture of a policy, in the absence

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of any agreement to that effect, results from negotiations or transactions with the insured, after knowledge of the forfeiture, by which the insurer recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some expense or trouble. (*Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419.) In the absence of an estoppel, knowledge of the facts and an intention to waive must exist—provable, of course, by the circumstances. (*Robertson v. Metropolitan Life Ins. Co.*, 88 N. Y. 541; *Weed v. London & L. Fire Ins. Co.*, 116 N. Y. 106; *Roby v. Am. Central Ins. Co.*, 120 N. Y. 510.)

The waiver of the forfeiture was conditioned upon "satisfactory evidence of good health" of the insured when the ten dollars were paid.

When the defendant received that payment it also received some vague information from a layman who did not profess to have any exact information, to the effect that the insured had a swollen foot and had been on his "annual spree." If the insured was no worse than this communication imported, the defendant might be willing to reinstate him, and to waive the forfeiture. But as he suddenly died the next morning, death might have resulted from illness ante-dating the payment or from some acute attack subsequent to it and quite apart from anything which had been suggested to defendant. It was a condition precedent to the maturity of the claim of the plaintiff that the proofs of death specified in the contract should be furnished. The acts of the defendant in furnishing blanks in the first instance, and giving instructions as to the manner of filling them, were acts of courtesy.

The clergyman's certificate was a proper part of the completed proofs. All the papers constituting the proofs of death and its cause were part of the evidence proper for the defendant to ask and for the plaintiff to give in order to impart to the defendant that full knowledge of the facts which, under the circumstances, was material to the reserved question of Ronald's reinstatement as a member, and also a condition precedent to any further acts to be relied upon as a waiver of for-

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feiture. The promise of payment made by defendant's representative was conditioned upon the approval of the board. As the matters relied upon to constitute a waiver were properly required by the defendant to enable it to ascertain the facts and decide as to its position, we think the court properly decided that there neither was a waiver nor any evidence tending to prove it that should have been submitted to the jury.

The plaintiff now raises the point, not presented at the trial, that the defendant could not forfeit Ronald's policy because no notice of the annual dues had been given him in advance of the date when the same became due pursuant to Ch. 341, Laws 1876, amended by Ch. 321, Laws 1877. The defendant is a mutual benefit association doing business upon the co-operative assessment plan. It was originally incorporated under Ch. 267, Laws of 1875, and reincorporated December 26, 1883, under Ch. 175, Laws 1883. Companies organized under the last mentioned act, and doing business upon the plan therein described and characterized as the co-operative or assessment plan, are by section five declared to be subject only to the provisions of that act; thus it would seem they are not subject to the provisions of the act requiring previous notice of the due date of annual dues. But as the case presents no exception upon this point and only presents such testimony as is material to the exceptions, the question is not properly before us.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

ELIZABETH J. DUDLEY, Appellant, v. EDWARD D. PARKER
et al., Respondents.

In an action, under the Civil Damage Act (Chap. 646, Laws of 1873), to recover damages for personal injuries alleged to have been received through intoxication caused by liquors sold by the defendant, the plaintiff must show that the furnishing of the liquor was, in whole or in part, the proximate cause of the intoxication and that the liquor was furnished to the individual whose intoxication inflicted or caused the injuries complained of.

In such an action it appeared that plaintiff's injuries were caused by the act of S. who, when intoxicated, drove a horse and buggy against a carriage in which plaintiff was riding, upsetting it. S. had invited one G. to ride with him that day, provided another person did not do so. On the evening before the accident, when passing defendants' liquor store together, G. invited S. to go in with him, which he did; S. remained near the door, while G. went on to the counter, had a bottle filled with whiskey, which he paid for, and both left together. It did not appear that they drank any of the whiskey that night, or that S. was informed by G. of his purpose to procure it. The next day G. went with S., taking the bottle of whiskey, from which they both drank. G. subsequently left the buggy and S. took in another person, with whom he was driving when the accident happened. *Held*, that the evidence failed to show that the sale of the liquor by the defendants was the proximate cause of the intoxication of S., but that the supply to him by G. of the liquor purchased by the latter was the proximate cause; and so, that defendants were not liable, and a denial of a motion for a nonsuit was error.

Reported below, 55 Hun, 29.

(Argued March 22, 1892; decided April 19, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 1, 1889, which set aside a verdict in favor of plaintiff and granted a new trial.

This action was brought to recover damages for personal injuries suffered by the plaintiff, occasioned by being thrown from the carriage in which she was riding with her husband on a highway in the county of Cayuga, on October 10, 1886.

This was caused by the act of one Edward Shaw who, in

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driving a horse hitched to a buggy and going in the same direction, recklessly drove against the carriage conveying the plaintiff, overturning it, causing serious injury to her. The plaintiff in her complaint alleged that Shaw was then intoxicated and that his intoxication was caused in whole or in part by intoxicating liquor which had been sold by the defendants to him and one Gage. The plaintiff had a verdict, and the exceptions were ordered heard at General Term in the first instance.

Further facts are stated in the opinion.

James C. Smith for appellant. The motion for a nonsuit was properly denied. (1 Starkie on Ev. 456; 3 Black. Comm. 373.) The seller is liable for the acts of an intoxicated person although he does not directly sell or give the liquor to such person; as, for instance, where one person "treats" another at the seller's place of business, and the treated person becomes intoxicated thereby and does actionable injury. (*Bertholf v. O'Reilly*, 74 N. Y. 509; *Valans v. Owen*, 74 id. 526; *Mead v. Stratton*, 87 id. 493; *New v. McKechnie*, 95 id. 632; *Davis v. Standish*, 26 Hun, 608; *Ford v. Ames*, 36 id. 571; *Bush v. Murray*, 66 Me. 472.) A motion for a new trial on exceptions ordered to be heard at the General Term in the first instance, is a statutory proceeding, and the General Term has no jurisdiction, power or authority on a motion of that kind, except such as the statute confers. (Code Civ. Pro. §§ 1000, 1002; *Beattie v. N. S. Bank*, 41 How. Pr. 137; *Hotchkiss v. Hodge*, 38 Barb. 117.) The suggestion that the charge ought to have been "qualified," implies that it was right, in part, at least. If a qualification was needed, it was the duty of the defendants to suggest it at the trial. (*Doyle v. N. Y. Infirmary*, 80 N. Y. 634; *Smedis v. R. R. Co.*, 88 id. 15; *Adams v. I. N. Bank*, 116 id. 606, 615; *Jones v. Osgood*, 6 id. 233, 235; *Bommer v. M. Co.*, 81 id. 468, 470; *Throop G. C. Co. v. Smith*, 110 id. 83, 93; *Post v. M. R. Co.*, 125 id. 697; *Lewis v. N. Y., L. E. & W. R. Co.*, 123 id. 496; *Day v. Town of New Lots*, 107 id. 148.)

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S. E. Payne for respondents. The motion for a nonsuit should have been granted upon the first ground stated in defendants' motion, viz.: "That there is no evidence that the defendants sold or furnished any liquor to Shaw." (*Bush v. Murray*, 66 Me. 472; *Bertholf v. O'Reilly*, 74 N. Y. 513; *Ford v. Ames*, 36 Hun, 571; *Macy v. Wheeler*, 30 N. Y. 231.) It is error for the court, in giving instructions, to assume that facts have been proved, or that a certain state of facts exists. (Sackett's Instruction to Juries [2d ed.], 19.) To entitle the plaintiff to recover, the damages claimed must be the direct consequence of the sale to Gage, and not the giving by Gage to Shaw. The relation of cause and effect must be shown to exist between the act complained of and the injury; and this relation of cause and effect cannot be made out by including the illegal acts of Shaw. (Sackett's Instruction to Juries [2d ed.], 275; *Bush v. Murray*, 66 Me. 472.) The plaintiff was bound to establish her case by competent evidence. (*Lovelan v. Briggs*, 32 Hun, 477; *Blatz v. Rohrbach*, 116 N. Y. 450; *Mandeville v. Marvin*, 30 Hun, 282.) There is no statutory provision which prohibits the General Term from correcting any mistakes or errors which may have been committed by the trial court, although no exception was taken, distinctly indicating the alleged error. (*Benedict v. Johnson*, 2 Lans. 94; *Costello v. S., etc., R. R. Co.*, 65 Barb. 92, 105; *Whittaker v. D. & H. C. Co.*, 49 Hun, 400; *Ackart v. Lansing*, 6 id. 476; *Johnson v. McConnel*, 5 id. 295; *Hamilton v. T. A. R. R. Co.*, 53 id. 27; *S. O. Co. v. A. Ins. Co.*, 79 id. 510; *Emmons v. Wheeler*, 5 T. & C. 617.)

BRADLEY, J. The main question presented is whether there was any evidence to justify the submission of the case to the jury, and this arises upon the exception to the denial of the motion for a nonsuit made on the ground that it did not appear that the defendants sold or furnished any liquor to Shaw. The conclusion was warranted that he was intoxicated at the time in question, and that the intoxicating liquor which caused or contributed to his intoxication was sold by the defendants,

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and that the plaintiff's injury was in consequence of such intoxication. The right of action in this class of cases is dependent upon the statute, which provides that "every * * * person who shall be injured in person * * * by any intoxicated person, or in consequence of the intoxication * * * of any person, shall have a right of action in his or her name against any person or persons who shall, by selling or giving away intoxicating liquors, caused the intoxication in whole or in part of such person or persons." (L. 1873, ch. 646.)

The purpose of this statute was to place the responsibility for the injurious consequences to others than the intoxicated person, upon those who should furnish the liquor which produced the intoxication of the person by whom, while in and by reason of that condition or in consequence of it, the injury should be caused or suffered. This obligation is one of the incidents imposed by statute upon the liquor traffic. The question when it arises is not one of care or diligence on the part of the seller, but is simply one of cause and effect. And as has been said by this court, while the statute should not by judicial construction be enlarged, it should be interpreted "according to its true intent and meaning, having in view the evil to be remedied and the object to be obtained." (*Mead v. Stratton*, 87 N. Y. 493.) And that "the legislature having control of the subject of the traffic in the use of intoxicating liquors, may make such regulations to prevent the public evils and private injuries resulting from intoxication as in its judgment are calculated to accomplish this end." (*Bertholf v. O'Reilly*, 74 N. Y. 509, 524.)

The statute is one of indemnity for consequences that may result from the traffic in liquors, consequences attributable to intoxication. But to charge a party, within the meaning of the statute, the furnishing the liquor by him must be in whole or in part the proximate cause of the intoxication to which the injury complained of may be imputable. And for that purpose the liquor must be furnished by such party to or for the person whose intoxication is the foundation of the charge of liability for the injury. In the present case the liquor was

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sold by the defendants, and the question is whether or not there was any evidence that Edward Shaw was a party to the purchase of it. He did not participate openly in the transaction of making it, but it is insisted on the part of the plaintiff that the inference was permitted that he was in fact a participant in the purchase made by one William Gage. The burden was with the plaintiff to prove that such was the fact. And for the purpose of proving her case in that respect she relied upon the evidence of those persons, by which it appears that they were engaged as employes in the same manufacturing establishment in the city of Auburn; that on Friday before the Sunday when the calamity occurred, Shaw invited Gage to go with him to Meridian the next Sunday, provided a young lady did not do so; that they were together Saturday evening on the street, and as they came to the defendants' liquor store Gage went in, and on his invitation Shaw went in with him; that the latter stopped inside near the door and talked with a person there while Gage proceeded thirty or forty feet farther to the counter and there had his bottle filled with whiskey, as he had before and periodically been accustomed to do; he paid for it, and they both went out together; that they soon parted and went to their homes; that Shaw repeated the invitation to Gage to go with him to Meridian the next day and was informed by the latter that he would let him know in the morning. It does not appear that they drank any of the liquor that night, or that Shaw was informed by Gage of his purpose to get any liquor, or that anything was said on the subject that evening by either to the other. Nor does it appear that Shaw knew the purpose for which Gage went into the defendants' place, unless it might be inferred from the fact that it was a liquor store. The next morning they met. Shaw procured a horse and buggy, and they together went to Meridian, Gage had with him the bottle of liquor purchased the night before, and from which they drank on their way there. On their arrival at Meridian Gage left the buggy, and Shaw took in a Mr. Brown, and with him in it was driving at the time the collision with the carriage in which the plaintiff was riding, and her injury as

the consequence occurred. It is quite evident from their manner of testifying, as appears by the record, that those witnesses had no desire to support, further than was necessary for them to do so, the plaintiff's alleged cause of action. And there may have been some reason, founded upon speculation, to apprehend that Shaw understood that Gage intended to get liquor when they went into the store, and that he had obtained it when they departed, but those facts do not nor does it appear that the liquor was by him intended for them or for any other than his own use by any evidence or any inference legitimately arising from it to that effect. In fact, the evidence of the witnesses was that it was not definitely concluded until Sunday morning that Gage would go with Shaw to Meridian. The fact, as claimed on the part of the plaintiff, that they were unwilling witnesses did not furnish any evidence in support of her action, although it might aid in giving construction favorable to the plaintiff's case of testimony given by them having doubtful import. The difficulty is that there was no evidence to the effect, or legitimately in support of inference, that Shaw was in any sense a purchaser, or in any manner participated in the purchase from the defendants, of the liquor which produced the intoxication. And, therefore, it did not appear that the act of the defendants in selling the liquor was the proximate cause of the intoxication of Shaw. But that it was the supply to him by Gage of the liquor purchased by the latter, which produced the intoxication of Shaw, who, while in that condition and in consequence of it, did the act which resulted in the plaintiff's injury. If Gage had been driving the horse at the time and the accident had then occurred as it did, a different question would have been presented. Then there would have been facts to support a recovery against the defendants. It not appearing that the defendants were responsible for the intoxication of Shaw, the plaintiff was not entitled to recover. The exception to the denial of the motion for nonsuit was, therefore, well taken.

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There were other exceptions, which, in the view taken, require no consideration.

The order should be affirmed and judgment absolute directed for the defendants.

All concur.

Order affirmed and judgment accordingly.

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SANDER HARRIS, Respondent, v. JOHN H. STRODL, Appellant.

V. died seized of certain premises, leaving his widow and three children, all of age, surviving him. By his will he gave to his widow all of his estate during life, or until she should remarry. Should she remarry, the executors were directed to sell all of the estate, pay one-third of the proceeds to her and divide the residue equally among the children, the children of any child who may have died to receive the parent's share. Upon the death of the wife without having remarried, the property was directed to be divided equally among the testator's children, the children of a deceased child to receive their parent's share. Full power was given to the executors to sell and convey the real estate "whenever they may deem it best to do so, and upon such terms as they may think desirable." The widow and children united in a conveyance of the premises to defendant, who contracted to sell the same to plaintiff. Defendant tendered a deed, executed by himself, which plaintiff refused to accept. In an action for specific performance, or, in case it could not be had, to recover back the purchase-money paid, defendant produced a deed, executed by the executors, which recited that the consideration stated was the same as that stated in the deed of the widow and children. It was not claimed that any portion of the consideration was paid to the executors as such. *Held*, that the first deed simply conveyed a title, subject to be defeated in part by the death of one of the children prior to the death or remarriage of the widow; that nothing remained for the executors to convey but the future contingent interests of the grandchildren, and this, under the power of sale, they could only so sell and convey as to secure the proceeds to the grandchildren in case of the contingency happening making them the ultimate devisees; that the deed executed by them was not a valid execution of the power; and, therefore, that defendant did not have a marketable title.

(Argued March 23, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

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made July 18, 1890, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought for the specific performance of a contract made by the parties February 16, 1888, for the sale by the defendant to the plaintiff of a lot in the city of New York for the price of \$24,900 by full covenant deed to be delivered April 15, 1888, conveying to plaintiff title in fee simple free from incumbrances, except as to outstanding tenancies and a mortgage, not here material.

The plaintiff paid \$1,000 upon the contract at its date and necessarily expended \$224.10 in examining as to the title, and was ready and willing to perform. The defendant tendered a deed of the premises executed by himself, which plaintiff refused to accept upon the ground that the deed under which defendant claimed did not convey to him full title for reasons discussed in the opinion. The complaint asks, in case specific performance could not be made, that he recover the \$1,000 advanced by him and his said expenses. The trial court directed judgment in favor of the plaintiff for said sums, with costs.

Further facts are stated in the opinion.

F. J. Moissen for appellant. The first conclusion of law by the court at Special Term that the title offered to plaintiff by defendant is not a good and marketable title, is erroneous. (*Morse v. Morse*, 85 N. Y. 53-58; 2 R. S. 729, § 56; 4 Kent's Comm. 321; *Crittenden v. Fairchild*, 41 N. Y. 289; *Hetzel v. Barber*, 69 id. 1-7; *Prentice v. Janssen*, 79 id. 479; *Armstrong v. McKelvey*, 104 id. 170-183; *Savage v. Sherman*, 24 Hun, 307.) The executors having the power under the will of John George Vix, to sell his real estate, etc., and it being admitted that the property conveyed by that deed is the property in question, the title in the defendant was perfect and marketable. (*Roseboom v. Mosher*, 2 Den. 68, 69; *Kinnier v. Rogers*, 42 N. Y. 531; *Belmont v. O'Brien*, 12 id. 394; *M. L. Ins. Co. v. Woods*, 121 id. 308; *Champlin v.*

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Champlin, 3 Edw. Ch. 377; *Fleming v. Burnham*, 36 Hun, 450.) The action being brought in equity to compel a specific performance of a contract upon a sale of real property, and tried in the equity branch of the court, the judgment should have been that the defendant convey or pay damages. (*Viele v. T. & B. R. R. Co.*, 20 N. Y. 188; *Shaffer v. Dietz*, 83 id. 300; *Margraf v. Muir*, 57 id. 158.) It was immaterial that the defendant's title was only made perfect at the trial, because if the defendant can give a good title at the time of the decree the complainant will be compelled to accept it. (*Pierce v. Nichols*, 1 Paige, 246; *Seymour v. Delancy*, 3 Cow. 505; *Brown v. Haff*, 5 Paige, 241; *Clute v. Robinson*, 2 Johns. 614; *Edgerton v. Peckham*, 11 Paige, 361; *Stevenson v. Spratt*, 3 J. & S. 505; *Jenkins v. Fahey*, 73 N. Y. 359.)

David McClure for respondent. The defendant was not at the time of contract possessed of the title. (*Colton v. Fox*, 67 N. Y. 348; *Loder v. Hatfield*, 71 id. 98; *Warner v. Durant*, 76 id. 133; *Smith v. Edwards*, 88 id. 92; *Delany v. McCormack*, Id. 174; *Bushnell v. Carpenter*, 92 id. 270; *Shipman v. Kollins*, 98 id. 324; *In re N. Y., L. & W. R. Co.*, 105 id. 89; *Goerlitz v. Malawista*, 56 Hun, 120.) The executors' deed tendered at the trial does not complete title. (*Scholle v. Scholle*, 113 N. Y. 261; *Dominick v. Michael*, 4 Sandf. 375; *Crittenden v. Fairchild*, 41 N. Y. 289; *Kinnier v. Rogers*, 42 id. 531; *Fisher v. Banta*, 66 id. 468; *Allen v. De Witt*, 3 id. 276; *Russell v. Russell*, 36 id. 581; *Roome v. Phillips*, 27 id. 357; *Smith v. Bowen*, 35 id. 83; *S. S. Bank v. Holden*, 105 id. 415; *Fleming v. Burnham*, 100 id. 1; *Moore v. Appleby*, 108 id. 241.)

LONDON, J. John George Vix died in 1874 in the city of New York seized of the premises in question as owner in fee simple, leaving his widow Salomea and his three sons, Jacob, George and Edward, all of full age, surviving him. He also left a will, which was afterwards duly proved, the material parts of which are as follows:

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"First. I devise and bequeath unto my beloved wife Salomea Vix all of my estate, both real and personal, of which I may be seized at the time of my decease. To have and to hold the same unto her for and during the time of her natural life, or until she shall remarry, to receive the rents, issues and profits thereof and apply the same as she shall see fit.

"Second. Should my said wife marry again after my death, then and in such case I do direct that all my said estate, real and personal, be sold by my executors hereinafter named, either at public or private sale, and one-third of the proceeds thereof paid to my said wife, and that the remaining two-thirds thereof be divided equally between my children, share and share alike, the children of any of my said children who may have died to receive the amount the parent would be entitled to if living.

"Third. Should my said wife die without marrying again, then upon her death I hereby direct that my said estate shall be divided between them, share and share alike, the children of any deceased child to receive the same proportion the parent would have received if living, the devisees in this clause being my children or the children of any of them who may have died.

"Fourth. I hereby give unto my said executors full power to sell and convey any and all of my said real estate whenever they may deem it best to do so and upon such terms as they may think desirable.

"Lastly. I hereby nominate and appoint my said wife Salomea to be executrix and my friend Michael Schmidt to be executor of this my last will and testament, hereby revoking all former wills by me made."

The widow is living and has not remarried. The three sons are living, Edward and George each have children, Jacob has none. Schmidt the executor is also living. February 1, 1886, the said widow and the three sons of the testator, the wife of Edward uniting in the conveyance, conveyed the premises in question to the defendant for the expressed consideration of \$19,500.

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Upon the trial the defendant produced a deed dated February 1, 1886, of the said executors of the will of the testator to the defendant of the premises. This deed was acknowledged by one executor December 5, 1888, and by the other January 31, 1889. This deed recites the consideration of \$19,500, being the same as recited in the deed given defendant by the widow and three sons. It is not claimed that the executors as such received any consideration whatever. The action was commenced in April, 1888.

It is obvious from the terms of the will that if any of the children of the testator should die before the remarriage of the testator's widow, or if she should not remarry if any of them should die in her life-time, that the children of such deceased child would be substituted in the parent's place as the ultimate devisees of the portion of the estate which the parent would take if living.

The deed from the testator's children conveyed to the defendant what they had a right to convey, namely, a title subject to be defeated in case the contingency contemplated by the testator should occur. This position is not contested by the appellant. But it is contended that the power of sale given to the executors by the fourth clause of the will is ample and that the deed given by them to the defendant cures the defect.

The power is "to sell and convey * * * whenever they may deem it best to do so, and upon such terms as they deem desirable." It is contended that they deemed it best to convey to the defendant for the purpose of vesting in him the remnant of the title which remained unconveyed after the conveyance of the widow and children, and that they deemed the confirmation of that conveyance upon the consideration expressed in it desirable terms. This may meet the letter of the power, but does not satisfy its spirit. The widow and three children of the testator having conveyed all their estate in the premises, nothing remained for the executors to convey but the future contingent estates of the grandchildren. Clearly they ought to have so sold these as to secure the proceeds to the grandchildren in the event of the contingency happening, making

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them the ultimate devisees of the testator. But as the case is presented the executors made the conveyance to the defendant so as to enable the takers of the defeasible estates to keep and convert to their own use the full price of the whole estate, as if their children had no contingent future estate in it. The plaintiff has full knowledge of all these facts. What defense could he make to the claim of the grandchildren if, as is not improbable, they become the testator's devisees? (*McMurray v. McMurray*, 66 N. Y. 175.)

The question is an important one. The general rule is that to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise. (*Allen v. De Witt*, 3 N. Y. 276; *Roome v. Philips*, 27 id. 357; *Russell v. Russell*, 36 N. Y. 581; *Adair v. Brimmer*, 74 id. 539; *Syracuse Savings Bank v. Holden*, 105 id. 415.)

Two cases recently before this court under the same will illustrate both the valid and the invalid execution of a power much like the one before us. (*Scholle v. Scholle*, 113 N. Y. 261; *Mutual Life Ins. Co. v. Woods*, 121 id. 302.)

It may be that the grandchildren will never take under the will, or if they should that a satisfactory answer to the question we have suggested could be made. But the purchaser is entitled to a marketable title. He should be protected against the risk suggested. (*Moore v. Appleby*, 108 N. Y. 241; *Meth. Epis. Ch. v. Thompson*, 13 N. Y. S. R. 130.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

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THE DUTCHESS COUNTY MUTUAL INSURANCE COMPANY, Appellant, v. FREDERICK S. VAN WAGONEN et al., Respondents.

The provision of the act in relation to assignments for the benefit of creditors (§ 2, chap. 466, Laws of 1877, as amended by chap. 294, Laws of 1888), which requires the assignor to state in the assignment "the residence and the kind of business carried on by such debtor at the time of making the assignment and the place at which such business shall then be conducted, and, if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor," is directory merely, not mandatory; the object of such provision being to identify the assignor and prevent his being confounded with others bearing the same name.

Where, therefore, in an action to set aside an assignment which stated the residence of the assignor and assignee to be the town of M., giving the county and state, but containing no statement of the kind or place of business of the assignor, it appeared that the assignor had resided for forty years and kept a country store at S., a hamlet, not incorporated as a village, in said town, and was known to almost every person of mature age there, and there was no other person of the same name residing in the town, *held*, that the omission did not render the assignment void, the description being sufficient to identify the assignor.

(Submitted March 24, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the second Monday of September, 1890, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Circuit without a jury.

This action was brought to set aside as fraudulent and void an assignment for the benefit of creditors, executed by Frederick S. Van Wagonen to one Jacob D. Van Wagonen, and for an accounting and the appointing of a receiver.

The facts, so far as material, are stated in the opinion.

Robert F. Wilkinson for appellant. The provisions of the statute of 1888 are mandatory, and the assignment, not complying with them, is void. (*Fairchild v. Gwynne*, 16 Abb. Pr. 23; *Hardman v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 id. 51; *Rennie v. Bean*, 24 Hun, 123; *Schwartz*

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v. *Soutter*, 41 id. 323; *Bloomingtondale v. Seligman*, 22 Abb. [N. C.] 98; 19 N. Y. S. R. 64; *Irving v. Campbell*, 121 N. Y. 353, 359, 360, 361; Cooley on Const. Lim. 88, 92, 93; *Taggart v. Herrick*, 55 Hun, 569; *Taggart v. Sisson*, 29 N. Y. S. R. 424; *Mullen v. Sisson*, 31 id. 210; *Strickland v. Larraway*, 29 id. 873-877; *Boak v. Blair*, 32 id. 911; *Richardson v. Herron*, 39 Hun, 537; *Johnson v. Kelly*, 43 id. 379.)

A. T. Clearwater for respondents. The assignment is valid. (Laws of 1888, chap. 294; *Bloomingtondale v. Seligman*, 19 N. Y. S. R. 64; *Taggart v. Herrick*, 55 Hun, 570; *Boak v. Blair*, 32 N. Y. S. R. 911.) The amendment is directory and not mandatory. (Laws of 1888, chap. 294; 4 R. S. [8th ed.] 2536; *Hooper v. Baillie*, 118 N. Y. 413; *Klump v. Gardner*, 114 id. 153; *Adee v. Cornell*, 93 id. 572; *Klumpf v. Gardin*, 15 N. Y. S. R. 100; *Warner v. Jaffray*, 96 N. Y. 248; *Nicoll v. Spowers*, 105 id. 1; *Richardson v. Thurber*, 104 id. 606; *Franey v. Smith*, 125 id. 44; *Camp v. Buxton*, 34 Hun, 511; *Pratt v. Stevens*, 94 N. Y. 387; *Thrasher v. Bentley*, 59 id. 650.) The instrument in question should be made available rather than be suffered to fail. (2 R. S. 740, § 2; *Crossing v. Scudamore*, 1 Vertr. 141; *Franey v. Smith*, 125 N. Y. 44; *Scott v. Mills*, 115 id. 376; 1 Kent's Comm. 463; *White v. Wager*, 32 Barb. 250; *Donaldson v. Wood*, 22 Wend. 395.) An assignment should be upheld if the language permit, rather than be defeated, and fraud is not presumed unless fairly inferable. (*Bingham v. Tilinghast*, 15 Barb. 618; *Townsend v. Stearns*, 32 N. Y. 209, 213; *Benedict v. Huntington*, 32 id. 219, 224; *Bogart v. Haight*, 9 Paige, 297; *Mann v. Whitbeck*, 17 Barb. 388; *Sherman v. Elder*, 24 N. Y. 381; *Kellogg v. Slauson*, 11 id. 302; *Platt v. Lott*, 17 id. 478; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainerd v. Dunning*, 30 N. Y. 211; *Read v. Worthington*, 9 Bosw. 617, 630; *Grove v. Wakeman*, 11 Wend. 187; *Coyne v. Weaver*, 84 id. 386; Bishop on Insol. Debtors, 183, 184.) A statute made in the

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affirmative, without any negative words expressed or implied, does not take away the common or existing statute law. (*People v. Allen*, 6 Wend. 487, 488; *People v. Peck*, 11 id. 604; *Gale v. Mead*, 2 Den. 160; *Witherell v. Mosher*, 9 Hun, 412; *People ex rel. v. Seaton*, 25 id. 305; *Douglass v. Haberstraw*, 88 N. Y. 618; *People v. Fitzgerald*, 37 id. 413; *Kennedy v. People*, 39 id. 245; *Cox v. People*, 80 id. 500; *People v. Conroy*, 97 id. 92; *People v. Willett*, 102 id. 251; *People v. Giblin*, 115 id. 196; *Delafield v. Brady*, 108 id. 524; *Laws of 1877*, chap. 466; *Laws of 1878*, chap. 318, § 1.) The spirit of the common law for centuries has been hostile to the narrow technical and strict construction contended for by the plaintiff. (3 Black. Comm. 407; Steph. Pl. 97; 2 R. S. 424, § 7; Code Pro. §§ 174-176; Code Civ. Pro. §§ 721-724.)

HAIGHT, J. On the fifth day of October, 1888, the defendant Frederick S. Van Wagonen executed and delivered to the defendant Jacob D. Van Wagonen, a general assignment for the benefit of creditors. The assignment states the residence of the assignor and assignee to be the town of Marbletown, in the county of Ulster, state of New York, but contains no statement of the kind or place of business of the assignor, and for this reason, it is claimed to be void.

Section 2, chapter 466 of the Laws of 1877, as amended by chapter 294 of the Laws of 1888, provides as follows:

"Every conveyance or assignment made by a debtor, of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and the kind of business carried on by such debtor, at the time of making the assignment, and the place at which such business shall then be conducted; and if such place be in a city, the street and number thereof; and if in a village or town, such apt designation as shall reasonably identify such debtor * * *."

It is claimed on behalf of the appellant that the provisions of this statute are mandatory, whilst on the part of the respondents, it is claimed to be directory merely. Upon this question,

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the courts below have differed in their conclusions. The case of *Bloomington v. Seligman* (19 N. Y. S. R. 64; *S. C.*, 22 Abb. [N. C.] 98), sustains the contention of the appellant, whilst *Taggart v. Herrick* (55 Hun, 569); *Taggart v. Sisson* (29 N. Y. S. R. 424); *Mullin v. Sisson* (31 id. 210); *Strickland v. Laraway* (29 id. 873); *Boak v. Blair* (32 id. 911), sustain the claim of the respondents.

The evidence taken upon the trial discloses the facts that the assignor resided at a place called Stoneridge, in the town of Marbletown; that it was a small hamlet consisting of a collection of houses on each side of the public highway, and was not incorporated as a village; that he had been a resident of the town for a period of about forty years, was a keeper of a country store at that place, was personally known to nearly every person of mature age residing within the limits of the town, and there was no other person residing in the town of the same name. It is, therefore, apparent that the place and kind of business carried on was well known and understood, and that no harm could result to his creditors from the omission to make such statement in the assignment. It should consequently not be annulled, unless it is required by the express provisions of the statute.

The rule that an affirmative statute, without any negative expressed or implied, is directory merely, and leaves the common law in force, may not be controlling upon the question under consideration, for it has more especial reference to statutes giving a new remedy. (2 Just, 200; *Stafford v. Ingersoll*, 3 Hill, 41; *Clark v. Brown*, 18 Wend. 220; *Almy v. Harris*, 5 Johns. 175; *Wood v. Chapin*, 13 N. Y. 521-526; *Hall v. Tuttle*, 6 Hill, 42; *Dwarris on Stat.* 638; *Hardmann v. Bowen*, 39 N. Y. 196.)

But in construing the provisions of the statute, the legislative intent must be our guide. The object of the provision evidently was to identify the assignor and prevent his being confounded with others bearing the same name. For this reason he is required to state the kind of business carried on by him; and if in a city, to give his street and number. The

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statute, however, does not state what the consequences shall be if the assignment fails to so state the business of the assignor. There are no express words of negation, and we see no reason why such words should be implied. The identification of the assignor may be determined by his signature to the assignment and the acknowledgment thereof before an officer specified in the statute. The statement omitted from the assignment would only furnish other means of identification. We, therefore, incline to the opinion that the statute should be construed as directory merely, and not mandatory.

The principle upon which this conclusion rests has been repeatedly recognized by the courts. It has accordingly been held that the title vests in the assignee, upon the delivery of the assignment, even before recording, although the assignment is, by the provisions of the statute, required to be recorded; that the provisions of the statute requiring the assent of the assignee to be subscribed and acknowledged by him, etc., are complied with by a signing and acknowledgment of the instrument without express words of consent; that the statute providing that the wages due employes shall be preferred, does not invalidate the assignment, even though it contains no provision for such employes. (*Warner v. Jaffrey*, 96 N. Y. 248; *Nicoll v. Spowers*, 105 id. 1; *Scott v. Mills*, 115 id. 376; *Richardson v. Thurber*, 104 id. 606; *Franey v. Smith*, 125 id. 44.)

The judgment should be affirmed, with costs.

All concur, except LONDON, J., not sitting.

Judgment affirmed.

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ROZELLEN ALDINGER, Respondent, v. EMERY S. PUGH,
Appellant.

The provision of the act authorizing the election of special county judges and surrogates in certain counties (Chap. 306, Laws of 1849, as amended by chap. 108, Laws of 1851), which provides that a special surrogate so elected "shall possess all the powers and perform all the duties which are possessed and can be performed by a county judge out of court," was not repealed by the Code of Civil Procedure.

Accordingly *held*, that a special surrogate, elected for the county of Oneida, had power to grant an injunction in a case where the county judge would have had jurisdiction (Code Civ. Pro. 606), and that one violating an order so granted was properly adjudged in contempt.

Reported below, 57 Hun, 180.

(Argued March 14, 1892; decided April 19, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made April 29, 1890, which affirmed an order of Special Term adjudging the defendant in contempt for violating an injunction order, granted December 7, 1888, by the special surrogate of Oneida county, in an action pending in the Supreme Court.

The facts, so far as material, are stated in the opinion.

Edward Lewis for appellant. The special surrogate of Oneida county had no jurisdiction or power to grant the injunction order in this case, and being without jurisdiction the order was absolutely void. (Const. N. Y. art. 6, § 16; Code Civ. Pro. §§ 606, 609; Laws of 1849, chap. 306; Laws of 1851, chap. 108.) If a special county judge and special surrogate ever possessed the power, under chapter 306, Laws of 1849, as amended by chapter 108, Laws of 1851, to grant injunction orders, they have not had that power since the adoption of the Code of Civil Procedure, which expressly provides what courts and officers may grant those orders. (Code Civ. Pro. §§ 606, 3348; *People v. Edison*, 20 J. & S. 63; *In re Tilden*, 98 N. Y. 442; *In re Hawley*, 100 id. 210; *People v. Jaehne*, 103 id. 182.) There can be no doubt but

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that the legislature intended to accomplish the same object in reference to civil procedure when it enacted the Code of Civil Procedure, as it did in reference to criminal procedure in enacting the Criminal and Penal Codes, to wit: To codify and bring all laws and amendments thereto into one law and under one system. (*Horton v. Cantirell*, 108 N. Y. 255; *Anderson v. Anderson*, 112 id. 104; *People v. G. & S. T. Co.*, 98 id. 78; *Hickman v. Pinckney*, 81 id. 211; *People v. Supervisors*, 85 id. 329; *Fraser v. Board*, 17 N. Y. S. R. 875; *People v. Jaehne*, 103 N. Y. 182; Code Civ. Pro. §§ 108, 109, 277, 342, 435, 472, 556, 606, 638, 872, 889, 915, 917, 2011, 2262, 2434, 2483; *Marks v. State*, 97 N. Y. 572; *In re Cierser*, 89 id. 401.) An injunction is a provisional statutory proceeding and the statute must be strictly complied with. (*Hudson v. Ins. Co.*, 77 N. Y. 278; *Roy v. Morris*, 30 Hun, 77.) Before a party can be punished for a civil contempt it must appear from the testimony and upon the evidence be found and adjudged that the acts complained of were calculated to, or actually did defeat, impair, impede or prejudice the rights or remedies of the party, and unless the evidence warrants such a finding (even though it be so found and adjudged in the order), the order should be reversed. (Code Civ. Pro. § 2283; *Fisher v. Baab*, 81 N. Y. 235; *In re Swinton*, 40 Hun, 41.) The injunction order was not served on Stephen J. Pugh, and, therefore, he cannot be punished for contempt. (*McAuley v. Palmer*, 40 Hun, 38; *Sanford v. Sanford*, 40 id. 540; *Zabo v. Baker*, 77 N. Y. 83.) Stephen J. Pugh was not bound by the injunction, he was an entire stranger to the action and injunction. (Willard's Eq. Juris. 324; *Fuller v. Fellows*, 9 How. Pr. 425; *Batterman v. Finn*, 32 id. 501; *Edmonston v. McLode*, 19 Barb. 356; *People v. Randall*, 73 N. Y. 416; *People v. Dwyer*, 90 id. 411.) That part of the referee's sixth finding of fact, viz.: "That that evening or the next day, Stephen J. Pugh was fully cognizant of the service of said order and its contents;" and also the eighth finding of fact, have no legal evidence to support them; such findings rest upon hearsay and suspicion only. (*In re Eldridge*, 82 N. Y.

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167; *People v. A. & V. R. R. Co.*, 20 How. Pr. 362; *People v. Randall*, 73 N. Y. 2; *Fitzgibbons v. Smith*, 41 N. Y. S. R. 678.) These proceedings being solely for the benefit of the plaintiff to indemnify her for any loss or injury, the case comes under the rule of law governing estoppels. (*Nenen v. Belknap*, 2 Johns. 573; *Lonsbury v. DePew*, 28 Barb. 48; *Hauley v. Griswold*, 48 id. 18; *Warren v. Hutchins*, 13 N. Y. S. R. 661; *Batterman v. Finn*, 31 How. Pr. 501; 73 N. Y. 423.) The defendant Emery cannot be punished for the acts of S. J. Pugh. He was neither his servant nor agent. (*People v. Randall*, 73 N. Y. 423; *Batterman v. Finn*, 32 How. Pr. 501; *Fitzgibbons v. Smith*, 41 N. Y. S. R. 678.) There is an entire absence of proof in the papers upon which the injunction order was granted to bring the cause within any provision of the Code, authorizing the granting of an injunction. (*Handcock v. Sears*, 93 N. Y. 79; *McHenry v. Jewett*, 90 id. 63.) This being a statutory proceeding, the statute must be strictly complied with. (Code Civ. Pro. § 2285; *Hersher v. K. Ins. Co.*, 77 N. Y. 278; *Ray v. Morris*, 30 Hun, 77; *People ex rel. v. Davison*, 35 id. 471.)

James Coupe for respondent. The special surrogate had power to grant the injunction. (Laws of 1851, chap. 108, § 1; *Seymour v. Mercer*, 13 How. Pr. 564; *Babcock v. Clark*, 23 Hun, 291; *Kinney v. Roberts*, 26 id. 166; *Hathaway v. Rouse*, 44 id. 161-163; Code Civ. Pro. §§ 606, 872.) The provisional remedy by temporary injunction is wholly preventive in its nature, and is designed to preserve the subject in controversy in the condition in which it was at the commencement of the suit without determining questions of right. (Code Civ. Pro. §§ 14, 3343; *King v. Barnes*, 113 N. Y. 476; 3 Daniels, 380; *Lewis v. Morgan*, 5 Price, 518; *Rorke v. Russell*, 2 Lans. 242; *Farrington v. Burdall*, 7 Wkly. Dig. 421; *People v. Vil. of West Troy*, 25 Hun, 179; *Sedwick v. Redmond*, Cary, 44; *King v. Barnes*, 113 N. Y. 476; *People ex rel. v. Sturtevant*, 9 id. 263; *People ex rel. v. Bergen*, 53 id. 404; *Clark v. Binninger*, 75 id. 344; *E. R. Co. v. Ram-*

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sey, 45 id. 637; *Daley v. Amberg*, 126 id. 490; *Abell v. N. Y., L. & W. R. R. Co.*, 18 Wkly. Dig. 544; 100 N. Y. 634; *Koehles v. F. & D. N. Bank*, 6 N. Y. Supp. 470; 117 N. Y. 661; *Gage v. Denbrow*, 49 Hun, 42; *Fiero on Spec. Pro.* 340, 341; *Mayor, etc., v. N. Y. & S. I. Co.*, 64 N. Y. 623; *Ogden v. Gibbons*, 4 Johns. Ch. 174; *Devlin v. Devlin*, 69 N. Y. 212.) The object of the injunction was to prevent the commission of waste, and to preserve the plaintiffs' rights and her property from material injury and prevent the defendant from disposing of his property to defraud the plaintiff. The Supreme Court has the same jurisdiction which the Court of Chancery formerly possessed, to restrain waste, upon a bill filed stating the facts. (*Rodgers v. Rodgers*, 11 Barb. 596; *Sloane v. Martin*, 8 N. Y. S. R. 139; Code Civ. Pro. §§ 603, 604; *People ex rel. v. Dwyer*, 1 Civ. Pro. Rep. 484; 63 How. 115, 116; 90 N. Y. 402; *Davis v. Sturtevant*, 3 Seld. 263; *Peck v. Yorks*, 32 How. Pr. 408; *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; *Mayor, etc., v. N. Y. & S. I. F. Co.*, 64 id. 622; *Mayor v. Dwyer*, 90 id. 402; *Wilcox v. Harris*, 59 How. Pr. 262; *Davis v. Mayor, etc.*, 1 Duer, 451-453; *People v. Spaulding*, 2 Paige, 326; *People v. Sturtevant*, 9 N. Y. 965; *Peck v. York*, 32 How. Pr. 408; *Wilcox v. Harris*, 59 id. 262; *People v. Dwyer*, 90 id. 409.) What was done by defendants after the violation of the injunction in drawing back manure on plaintiff's farm cannot avail them here. (*Stubbs v. Ripley*, 39 Hun, 626.) The items of disbursements and counsel fees were proper items to be included in the fine, and within the limits of the provisions of the Code, section 2284. (*People v. R. & S. R. R. Co.*, 76 N. Y. 294; *King v. Barnes*, 113 id. 476.)

FOLLETT, Ch. J. Chapter 306 of the Laws of 1849, as amended by chapter 108 of the Laws of 1851, provides that the special surrogates of Oneida and of certain other counties "shall possess all the powers and perform all the duties which are possessed and can be performed by a county judge out of court." It is agreed that prior to the adoption of the Code of

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Civil Procedure these special surrogates had power to grant such an injunction as was granted in this case, and section 606 of that Code expressly confers jurisdiction on county judges to grant such injunctions. But the appellant contends that the statutory provision above quoted was repealed by the Code of Civil Procedure. This question is not an open one, it having, in principle, been settled by this court adversely to the appellant's contention. (*Ross v. Wigg*, 36 Hun, 107; affd. 101 N. Y. 640.) That case arose out of the following facts: March 24, 1884, a judgment was recovered against Wigg in the Supreme Court, which was entered and docketed in the office of the clerk of Oswego county. April 29, 1884, the recorder of the city of Oswego granted an order in proceedings supplementary to execution issued on the judgment. The judgment debtor was examined, and June 4, 1884, the recorder appointed a receiver of the property of the judgment debtor. A motion was made to set aside the orders on the ground that the recorder had no jurisdiction of such proceedings. By section 4 of chapter 96 of the Laws of 1857 the recorder of the city of Oswego was authorized "to exercise any power or authority in any proceedings supplementary to execution in the county of Oswego which the county judge or a justice of the Supreme Court can exercise therein whether such supplementary proceedings be in an action in said recorder's court or in any other court." Section 2434 of the Code of Civil Procedure, as it stood in 1884, provided that supplementary proceedings might "be instituted before a judge of the court out of which, or the county judge, or the special county judge, or the special surrogate of the county to which execution was issued." The recorder of the city of Oswego was not mentioned in the section. It was argued in that case, as in this, that the Code of Civil Procedure was intended to be a codification of the laws prescribing the practice in the actions and proceedings embraced therein, and by implication the power conferred upon the recorder by chapter 96 of the Laws of 1857 was repealed. It was held otherwise in the case cited. The opinion delivered in the case at bar by the

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learned General Term, and reported in 57 Hun, 181, satisfactorily discusses and disposes of the jurisdictional question, and we are quite content to affirm and we do affirm the order upon that opinion.

The order should be affirmed, with costs.

All concur.

Order affirmed.

ELIZABETH GREENLEAF et al., Respondents, v. THE BROOKLYN, FLATBUSH AND CONEY ISLAND RAILROAD COMPANY et al., Appellants.

In an action of ejectment a judgment in partition which is a link in the chain of title of one of the litigants is evidence as against the other, although a stranger to it.

Where such a judgment or a deed is so ancient that no person living can testify to acts of ownership under it, it is admissible in evidence without proof of contemporaneous possession of the land by the parties to the judgment or deed.

Such a judgment or deed, however, is not sufficient evidence to establish title in one who claims under it, through mesne conveyances, without showing some subsequent or modern possession by those who received later deeds which go to make up the claimant's chain of title.

In an action of ejectment plaintiff claimed title under a judgment rendered in 1848 in a partition suit, by which certain meadow land bounded on the Atlantic ocean, including the land in question, which was land on the ocean beach, was set off to J., one of the parties, also a deed to him from the other parties to that action. There was no evidence that the land in question had been occupied by J. or his successors in title for any purpose, or that he was ever in possession of or exercised any acts of ownership over the land set off to him, except by assuming to convey it. *Held*, that the evidence failed to establish title in plaintiff.

(Argued December 16, 1891; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Circuit.

This was an action of ejectment begun July 11, 1882, to recover in fee the land hereinafter described. The defend-

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ants, by their answers, deny that the plaintiffs have title, but they do not allege that they or either of them have title to the land in dispute.

The facts, so far as material, are stated in the opinion.

William C. De Witt for appellants. The plaintiffs having failed to show possession of the land in suit, either in themselves or their grantors, and having neglected to trace their paper title in regular course to the sovereign, the judgment was unwarranted by the evidence, and cannot be sustained in law. (Abb. Tr. Ev. 705; Tyler on Eject. 483, 485, 495, 541; *Gardner v. Hart*, 1 N. Y. 528; *City of Cincinnati v. White*, 6 Pet. 431, 441; *Clute v. Voris*, 31 Barb. 511, 518; *Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Edwards v. Noyes*, 65 id. 125; *Roberts v. Baumgarten*, 110 id. 380.) The judgment in partition introduced by the plaintiff was not sufficient to prove seizin or possession against the defendants, who were not parties or privies to that proceeding. (*DeGraff v. Hovey*, 16 Abb. Pr. 120; *Sheridan v. Andrews*, 49 N. Y. 484; *Campbell v. Hall*, 16 id. 579; *Ainslee v. Mayor*, 1 Barb. 169; *Douglas v. Howland*, 24 Wend. 35; *Clark v. Montgomery*, 23 Barb. 464; *Armstrong v. Munday*, 5 Den. 166; *Ten Eyck v. Frost*, 5 Cow. 346; *Monarque v. Monarque*, 80 N. Y. 326; *Beekman v. Witter*, 2 Johns. 180; *Tanner v. Niles*, 1 Barb. 560; *Sanford v. White*, 56 N. Y. 356; *Smith v. Vroman*, 13 Johns. 488; *Deming v. Corwin*, 11 Wend. 648; *Hamilton v. Morris*, 7 Paige, 161; *Jackson v. Newton*, 18 Johns. 355, 361, 362; *Northrop v. Wright*, 7 Hill, 476, 490, 495; *Arvill v. Wilson*, 4 Barb. 180; *Bigelow v. Fuich*, 11 id. 498; *Sparrow v. Kingman*, 1 N. Y. 242; *Henry v. Reichart*, 22 Hun, 394.) The declarations of the deceased surveyor were incompetent. (*Hannicutt v. Peyton*, 102 U. S. 333.)

Thomas E. Pearsall for property owners similarly interested with appellants. Plaintiffs failed to establish a cause of action, and the court erred in denying the motion for a non-

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suit. (*Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Miller v. Downing*, 54 id. 631; *Downing v. Miller*, 33 Barb. 386; *Stevens v. Hansen*, 39 N. Y. 302; *Shumway v. Leakey*, 67 Cal. 458; *Zink v. McManus*, 49 Hun, 583; *Thompson v. Burhaus*, 61 N. Y. 52; *Hasbrouck v. Burhaus*, 47 Hun, 487; *Roe v. Strong*, 107 N. Y. 350.) The admission in evidence of the commissioner's map was error. (Abbott's Trial Ev. 699.) It was error to admit the declarations of the deceased surveyor Bergen, against defendant's objection, and to deny the motion to strike out. (*Partridge v. Russell*, 18 N. Y. S. R. 605; *Shannon v. Pickell*, 2 id. 160; *McCormick v. Barnum*, 10 Wend. 104.) The proceedings in partition were erroneously admitted in evidence against defendant's objection. They were *res inter alios acta*. (*Chapman v. Frank*, 5 N. Y. Supp. 448; *Beyer v. Schultze*, 10 N. Y. S. R. 467; Abbott's Trial Ev. 830; *M. E. R. Co. v. M. R. Co.*, 14 Abb. [N. C.] 103; *Bookman v. Stegman*, 105 N. Y. 621.) Title to land cannot be proved or disproved merely by oral admissions. (Abb. Tr. Ev. 710.)

Mornay Williams and *Frederic A. Ward* for respondents. Plaintiffs in ejectment are only required in the first instance to make a *prima facie* case; they need not show an indefeasible title in themselves. (*Greenleaf v. B., F. & C. I. R. R. Co.*, 37 Hun, 435; *Poe v. Strong*, 119 N. Y. 316; *Dunham v. Townshend*, 118 id. 281, 288; *Mayor, etc., v. Carleton*, 113 id. 284; *Stevens v. Hauser*, 39 id. 302; *Smith v. Lorillard*, 10 Johns. 338; *Jackson v. Harder*, 4 id. 202; *Jackson v. Denn*, 5 Cow. 200; *Jackson v. Belknap*, 12 Johns. 96; *Jackson v. Cole*, 4 Cow. 597; *Pope v. Hammer*, 74 N. Y. 240.) The documentary evidence introduced by the plaintiffs was sufficient to establish seizin and the right to the possession of the lot set out in the partition suit. (*Webb v. Den*, 17 How. [U. S.] 577; *Barr v. Gratz*, 4 Wheat. 213; *Canaan v. G. T. Co.*, 1 Conn. 1; *Burhans v. Burhans*, 2 Barb. Ch. 398; 4 Kent's Comm. 365; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 3 id. 302; *Striker v. Mott*, 2 Paige, 387;

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Brownell v. Brownell, 19 Wend. 367; *O'Dougherty v. Aldrich*, 5 Den. 385; *Florence v. Hopkins*, 46 N. Y. 182; *Van Schuyver v. Mulford*, 59 id. 426; *Sullivan v. Sullivan*, 66 id. 37; *Ensign v. McKinney*, 30 Hun, 249, 253; *Lawson on Pres. Ev.* 31; *Rex v. All Saints*, 7 B. & C. 789; *Moore v. Titman*, 33 Ill. 358; *Hartwell v. Root*, 19 Johns. 345; *Taylor on Ev.* § 1674; *Mead v. Mitchell*, 17 N. Y. 210; *Clemens v. Clemens*, 37 id. 59; *Jope v. Morshead*, 6 Beav. 213; *Grignon v. Astor*, 2 How. [U. S.] 319; *Prior v. Prior*, 49 Hun, 502; *Blakely v. Calder*, 15 N. Y. 617; *Howell v. Mills*, 56 id. 226; *Jordan v. Van Epps*, 85 id. 427; *Jenkins v. Fahey*, 73 id. 355, 361; *Cromwell v. Hull*, 97 id. 209; *Woodhull v. Little*, 102 id. 165; *Reed v. Reed*, 107 id. 545; *Cole v. Hall*, 2 Hill, 625; *Brevoort v. Brevoort*, 70 N. Y. 136; *Hall v. Laro*, 102 U. S. 461; *Jackson v. Laroway*, 3 Johns. Cas. 283; *Jackson v. Luquere*, 5 Cow. 221; *Hewlett v. Cock*, 7 Wend. 371; *Doe v. Pulman*, L. R. [3 Q. B.] 622.) The declarations made to Crooke by Bergen were competent and were properly admitted. (*Nicholls v. Parker*, 14 East. 331; *Wood v. Willard*, 37 Vt. 377; *G. F. Co. v. Wooster*, 15 N. H. 412; *Adams v. Stan-yan*, 24 id. 405, 417; *Gibson v. Poor*, 1 Foster, 444; *Wooster v. Bulter*, 13 Conn. 309; *Caufman v. C. C. Spring*, 6 Binn. 59; *Birmingham v. Anderson*, 40 Penn. St. 506; *Kennedy v. Lubold*, 88 id. 246, 255; *Howell v. Tilden*, 1 H. & M. 84; *Bladen v. Cockey*, 1 id. 230; *Redding v. McCubbin*, 1 id. 36; *Spear v. Coate*, 3 McCord, 228; *Blyth v. Sutherland*, Id. 258; *Beard v. Talbot*, Cooke, 142; *McCloud v. Mynatt*, 2 Coldw. 163; *Tucker v. Smith*, 68 Tex. 473; *People v. Driscoll*, 107 N. Y. 414; *Pontius v. People*, 82 id. 339.) Where the plaintiff has shown at the least, color of title, while the defendant on his own case is proved to be a trespasser, the plaintiff must recover. (*Foot v. Stevens*, 17 Wend. 483; *Bloom v. Burdick*, 1 Hill, 130, 141.)

FOLLETT, Ch. J. So far as the case before us shows, the earliest reference to the land in dispute is contained in the judgment-roll in partition.

In March, 1847, Ann Stilwell, her husband joining, filed a bill in the late Court of Chancery against John and Jacobus Emmons, alleging that they were seized in fee as tenants in common of the land now in dispute, and of other lands.

Jacobus Emmons answered by his guardian *ad litem* and submitted his rights to the court.

John Emmons also answered and admitted the allegations of the bill. The mother of John and Jacobus Emmons had remarried, and she and her husband were also parties defendant, who answered that the mother was entitled to dower in part of the premises. A reference was ordered to report upon the rights and interests of the parties to the action in the subject-matter thereof. December 23, 1847, an interlocutory judgment was entered in the action in partition, appointing commissioners to make actual partition of the lands. March 1, 1848, the commissioners made and filed their report partitioning the lands between the parties to the action. That which is in dispute in this action was set off to John Emmons, and is thus described: "All that certain piece or parcel of meadow land situated, lying and being in the said town of Gravesend, and known and designated on the said map as and by the number XXIII (twenty-three) on the said map, bounded and described as follows, to wit: Beginning at a certain stake standing on Duck Hill, placed at the division line between meadows of the heirs of Abraham Emmons and the said parcel number XXIII (twenty-three); running thence south five degrees east twenty-four chains along said meadow land of the heirs of Abraham Emmons to the Atlantic Ocean; running thence north seventy-nine degrees and thirty minutes east one chain and seventeen links along the said Atlantic Ocean to parcel number XXIV (twenty-four), allotted and set apart by us to Jacobus Emmons, as hereinafter mentioned; running thence north five degrees and forty-five minutes west along the division line between parcel XXIII (twenty-three) and XXIV (twenty-four) twenty-four chains to Duck Hill and to a certain stake there standing and put and placed by us; running thence south seventy-nine degrees and thirty minutes

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west one chain to the point or place of beginning, containing two acres, two rods and fourteen perches."

The commissioners filed in the clerk's office a map of the lands partitioned, showing the part assigned to each, and known as No. 173. March 10, 1848, a final judgment was entered confirming the report of the commissioners, and in addition the parties conveyed to each other the lands set apart to each; Ann Stillwell and her husband and Jacobus Emmons by his guardian assumed to convey parcel No. 23 to John Emmons by a deed dated April 6, 1848, and duly recorded in Kings county April 8, 1848. John Emmons assumed to convey lot No. 23 to Charles H. Greenleaf by a deed dated September 30, 1848, and duly recorded February 8, 1850. Charles H. Greenleaf assumed to convey an undivided half of this lot to James S. Butler by a deed dated July 27, 1877, and recorded September 17, 1877. Afterwards Charles H. Greenleaf died, having devised his real estate to Elizabeth Greenleaf, one of the present plaintiffs. Upon the trial before the court without a jury, the plaintiff recovered the possession of the premises, as tenants in common in fee simple, with \$100 damages for the wrongful withholding, which was affirmed at General Term.

The important question involved in this appeal is, whether the plaintiffs gave sufficient evidence of title to sustain a recovery in ejectment. Their evidence is solely documentary and consists of the judgment-roll in partition and the subsequent deeds already referred to. The defendants insist that the judgment was not competent evidence. It is unnecessary to consider the authorities discussing the conclusiveness of judgments, for they are so, only as between the parties and their privies, unless they are the result of proceedings *in rem*, and moreover the plaintiffs do not assert that the judgment is an estoppel in their favor and against the defendants, but their contention is that it is evidence of title and possession in the parties to it, liable like other evidence to be rebutted, but until overthrown sufficient to sustain a recovery in ejectment against defendants producing no evidence of title. A judgment *in personam*, like a deed or other muniment of title, in case it is

a link in the chain of the title of one of the litigants, is admissible in evidence as against the other, though a stranger to it. (*Barr v. Gratz*, 4 Wheat. 213; *Webb v. Den*, 17 How. [U. S.] 576; *Buckingham v. Hanna*, 2 Ohio St. Rep. 551; *Davies v. Lounds*, 1 Bing. [N. C.] 597-606; Freem. Judgt. § 416; 2 Black. Judgt. § 607; 1 Whart. Ev. §§ 200, 733, 820 *et seq.*; 1 Green. Ev. § 538; 2 Taylor Ev. [8th ed.] § 1668.) The authenticity of the judgment was established by the record and it was clearly admissible as an evidence of title, unless the defendants' position can be sustained that neither it nor the subsequent deed from Emmons to Greenleaf were admissible because it was not shown that the parties to the judgment or to the deed had possession of the lands to which these documents relate.

It is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof. (*Jackson v. Laroway*, 3 Johns. Cas. 283; *Jackson ex dem. v. Luquere*, 5 Cow. 221; *Hewlett v. Cock*, 7 Wend. 371; *Ensign v. McKinney*, 30 Hun, 249; *Rogers v. Allen*, 1 Camp. 309; *Doe v. Pulman*, 3 Ad. & El. [N. R.] 622; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Bristow v. Cornican*, L. R. [3 App. Cas.] 641-668; *Gardner v. Grannis*, 57 Geo. 539; *Whitman v. Heneberry*, 73 Ills. 109; 1 Green. Ev. §§ 21, 144; 1 Whart. Ev. §§ 199-733; 2 Phill. Ev. [Edw. ed.] 477; Best's Ev. § 499; 1 Taylor's Ev. [8th ed.] §§ 87, 665.)

While under this rule the judgment in partition and the subsequent deed to John Emmons were admissible in evidence without proof of contemporaneous possession of the land by the parties to the judgment and deed, yet they are not sufficient evidence of title of one who claims under them through mesne conveyances to recover in ejectment, without showing some subsequent or modern possession by the parties who have received later deeds which go to make up the plaintiff's chain of title.

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In the case at bar there is no evidence that the land in dispute was part of a larger tract possessed by some of the grantees in the plaintiff's chain of title. There is no evidence that John Emmons was ever in possession, or exercised an act of ownership over the land, except when he assumed to convey it to Charles H. Greenleaf. Nor is there any evidence that Greenleaf took possession under his deed or exercised any act of ownership, except when he assumed to convey an undivided one-half to Butler.

These lands on the beach are incapable of being enclosed with fences and occupied like ordinary agricultural lands, but there is no evidence that they have been occupied for any purpose. It does not appear that grass or sand has been taken from them, or that they have been used as a means to approach the ocean for fishing or for any purpose.

We think the evidence failed to establish title in the plaintiffs, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except BROWN, J., not sitting.

Judgment reversed.

BERNARD BRADY, Respondent, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Appellant.

132	415
144	67

By a contract for regulating and grading one of defendant's streets at a price specified for the different kinds of work, after providing for substantial performance in accordance with the specifications, it was stipulated that defendant's commissioner of public works should determine what would constitute a performance; daily inspection, a right on defendant's part to change the grade, and an examination by a surveyor after excavation, were also provided for, and when the completion of the work was duly certified by three of defendant's officers named, and also by its commissioner of public works, it agreed to pay therefor. In an action to recover for the work done at the contract prices, plaintiff produced in evidence the certificates required by the contract which showed the amount of work done, and certified to the completion of the contract and acceptance of the work. No fraud or invalidity in the contract was alleged by defendant, and that the work as certified was done was

Statement of case.

not questioned, but it claimed on the trial non-compliance with this provision of the contract: "The street is to be regulated two feet below the grade where there is rock, and is to be examined by the surveyor before placing any filling thereon. * * * Any portion of the street not thus regulated and properly examined will not be received as finished." This defense was not set up in the answer. Defendant was permitted to give evidence, under objection that it was not admissible under the pleadings, which tended to show that in places rock was left nearer than two feet to the established grade. The court directed a judgment for plaintiff for the amount as certified, with interest. *Held*, no error; that defendant was not entitled to give evidence, or to go to the jury on the question of non-compliance with said provision of the contract as it was not raised by the pleadings, and that as the reception of the evidence was error, this court was precluded from considering it for the purposes of reversal.

The specifications provided that the street was "to be regulated and graded, where required, in accordance with the plans and profile of the said street," and other portions of the contract showed that the specifications were not necessarily to be exactly but substantially performed to the satisfaction of the commissioner of public works. It appeared that the surveyor gave to the contractor the grade to which the work was conformed, and he certified to the completion of the work as stipulated. *Held*, that defendant was precluded by the certificates given as required by the contract; and that conceding the evidence so given by defendant was properly received and could be considered, it did not affect plaintiff's right of recovery.

The contract provided that the city should not be "precluded or estopped by any return or certificate" of any of its officers, made in pursuance of the contract, "from at any time showing the true and correct amount and character of the work." *Held*, that this provision did not have the effect to nullify defendant's agreement to be bound by the certificates of its officers as to performance, and did not affect the contractor's right to recover for the work done at the prices fixed, but that it simply reserved the right to challenge and to call upon the court to correct the certificates for error in these particulars: 1. As to the amount of the work, *i. e.*, the number of yards of filling and excavation, etc. 2. As to the character of the work, *i. e.*, that one kind of work had been estimated for another.

Reported below, 26 J. & S. 184.

(Argued March 8, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 5, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

Statement of case.

This was an action brought by plaintiff, as assignee of John Brady, to recover upon a contract made by the assignor with defendant for regulating and grading Ninety-fifth street in the city of New York, from Tenth avenue to Riverside Drive.

The facts, so far as material, are stated in the opinion.

David J. Dean for appellant. Complete performance of the work specified in the contract is an imperative condition precedent to the right to payment. (*Glacius v. Black*, 50 N. Y. 145; *Smith v. Brady*, 17 id. 174, 185; *Vanderzee v. Herman*, 13 N. Y. Supp. 164; *Lennon v. Smith*, 124 N. Y. 578; *Phelan v. Mayor*, 119 id. 90; *McIntosh v. Rector, etc.*, 120 id. 12; *Avery v. Wilson*, 81 id. 344; *Catlin v. Tobias*, 26 id. 217; *Mead v. Degolyer*, 16 Wend. 632; *Norrington v. Wright*, 115 U. S. 204; *Nightingale v. Eisenman*, 121 N. Y. 288; *Reilly v. Mayor, etc.*, 111 id. 474; *Bonesteel v. Mayor, etc.*, 22 id. 166; *Cunningham v. Jones*, 20 id. 486; *Ibbotson v. Sherman*, 10 J. & S. 477; *Crane v. Knubel*, 2 id. 443; *McDonald v. Mayor, etc.*, 68 N. Y. 23; *Smith v. City of Newburgh*, 77 id. 130; *Hodges v. City of Buffalo*, 2 Den. 110; *Peterson v. Mayor*, 17 N. Y. 449.) Even if a substantial performance of the contract would entitle the plaintiff to recover, the question of substantial performance, on the evidence, was a question for the jury, and the exception to the denial of the request to submit the case to the jury is well taken. (*Johnston v. DePeyster*, 50 N. Y. 666; *Phillips v. Gallant*, 62 id. 256; *Thomas v. Fleury*, 26 id. 26; *Smith v. Brady*, 17 id. 189.)

L. Laflin Kellogg for respondent. The court committed no error in directing a verdict in favor of the plaintiff on the first cause of action. There was no question of performance which could be rightly submitted to the jury. (*Sweet v. Morrison*, 116 N. Y. 32; *Phelan v. Mayor, etc.*, 119 id. 86; *Whiteman v. Mayor, etc.*, 21 Hun, 117; *D. & H. C. Co. v. P. C. Co.*, 50 N. Y. 250; *M. & P. R. R. Co. v. March*, 114 id. 549; *Byron v. Low*, 109 id. 291; *Mulholland v. Mayor, etc.*, 113 id. 632; *State v. Stevens*, 71 id.

Opinion of the Court, per PARKER, J.

529; *Kingsley v. City of Brooklyn*, 78 id. 200; *Smith v. Alker*, 102 id. 87; *Weeks v. Little*, 89 id. 566; *Grubie v. Schultheis*, 57 id. 669; *Lawson v. Hogan*, 93 id. 39; *Peck v. United States*, 102 U. S. 64; *Winch v. M. B. I. Co.*, 86 N. Y. 619; *Woodward v. Fuller*, 80 id. 313; *Nolan v. Whitney*, 88 id. 648; *Lathers v. Keogh*, 108 id. 586.) Both parties having requested the court to direct a verdict in their favor, neither one can complain that the case was not left to the jury. (*Winchell v. Hicks*, 18 N. Y. 565; *Colligan v. Scott*, 58 id. 671; *Provost v. McEncroe*, 102 id. 650.) No claim has been made in this case that the contract was illegal because based on an unbalanced bid, but, if such a claim had been made, it would have been without force and effect. (*Reilly v. Mayor, etc.*, 111 N. Y. 473; *Mayor, etc., v. Brady*, 115 id. 599.) Plaintiff should be awarded damages by way of costs under section 3251 of the Code of Civil Procedure. (*Brady v. Mayor, etc.*, 107 N. Y. 673; *Mayor, etc., v. Brady*, 115 id. 599.)

PARKER, J. The judgment under review awards to the plaintiff, as assignee of one John Brady, the sum of \$42,792.35, adjudged to be due under a contract between John Brady and the defendant, by which it was provided that Brady should regulate and grade 95th street, from Tenth avenue to River street drive, for which he was to receive \$8 per cubic yard for excavating earth; one-fourth of a cent per cubic yard for excavating rock; and one-fourth of a cent per lineal foot for furnishing and setting curbstones, and for furnishing and laying flagging per square foot, one-fourth of a cent.

This will be recognized as what is known as an unbalanced bid, but its legality is not sought to be questioned here, and if it were it would not be open for consideration in view of the discussion of the question as presented by the contract now before us by RUGER, Ch. J., in 115 N. Y. 599.

Prior to the commencement of this action the officials, authorized by the contract to represent and act for the city in all matters relating to the performance of the work stipulated for by it, made the following certificates:

Opinion of the Court, per PARKER, J.

"SURVEYOR'S CERTIFICATE.

"I hereby certify that the following amount of work has been done in the matter of regulating and grading Ninety-fifth street, from the west curb of Tenth avenue to the east line of Riverside Drive, and setting curbstones and flagging sidewalks therein.

JOHN BRADY,

"Contractor Since the Commencement of the Work.

"14,667 cubic yards of earth excavated (fourteen thousand six hundred and sixty-seven).

"10,831 cubic yards of rock excavated (ten thousand eight hundred and thirty-one).

"— cubic yards of filling.

"2,591 $2\frac{1}{2}$ linear feet of curb set (twenty-five hundred and ninety-one $2\frac{1}{2}$).

"10,458 $\frac{1}{4}$ square feet flagging laid (ten thousand four hundred and fifty-eight $\frac{1}{4}$).

"Linear feet of dry stone box culverts.

"Linear feet of picket fence.

"HERMAN K. VIELE, *Surveyor.*

"Date, *May* 27, 1885.

"GEORGE A. JEREMIAH,

"Superintendent of Street Improvements."

"FINAL PAYMENT.

"The City of New York,

"To John Brady, Contractor, Dr.:

"For work done in the matter of regulating and grading Ninety-fifth street, from the west curb of Tenth avenue to the east line of Riverside Drive, and setting curbstones and flagging sidewalks therein.

"Certificate of acceptance of the work by the commissioner of public works, dated September 21, 1885, Chap. 397, Laws 1852; chap. 580, Laws of 1872, sec. 4.

"Street improvement fund, authorized or contracted for after June 9, 1880.

"Ordinance approved March 20, 1883 (Sec. 139, N. Y. Consolidation Act of 1882). Estimated cost, \$15,676.28.

Opinion of the Court, per PARKER, J.

Date.	Amount and Kind of Work.	Price.	Amount.
"1885.			
"Sept. 30.	14,667 cubic yards of earth excavated (fourteen thousand six hundred and sixty-seven).	\$8 00	\$117, 336 00
	"10,831 cubic yards of rock excavated (ten thousand eight hundred and thirty-one)..	$\frac{1}{2}$	27 07
	"2,591 $1\frac{3}{4}$ -12 cubic yards filling, linear feet of curb set (two thousand five hundred and ninety-one $1\frac{3}{4}$ -12)....	$\frac{1}{2}$	6 47
	"10,458 $\frac{1}{2}$ square feet of flagging laid (ten thousand four hundred and fifty-eight $\frac{1}{2}$).	$\frac{1}{2}$	26 14
	"Linear running feet dry stone box culverts ...		
			<u>\$117, 395 68</u>
	"Deduct security retained, 1,366 linear feet.	25	341 50
	"Amount, one hundred and seventeen thousand and fifty-four 18-100 dollars.		\$117, 054 18
	"Excess of inspection, 249 days, \$3.	747 00	
	"Amount heretofore paid.	82, 176 96	
			<u>82, 923 96</u>
	"Balance now due, thirty-four thousand one hundred and thirty 22-100 dollars.		<u>\$34, 130 22</u>

Opinion of the Court, per PARKER, J.

"I certify that I have duly examined the above account, and compared it with the contract and the surveyor's certificate, and that it is correct, and the amount justly due.

"GEORGE W. BIRDSALL,

"Chief Engineer Croton Aqueduct.

"GEORGE A. JEREMIAH,

"Superintendent of Street Improvements."

"I hereby certify that I have examined the above account, and believe it to be correct; that the prices charged are in accordance with the terms of the contract for regulating and grading Ninety-fifth street, dated July 31, 1883; and such services as are herein specified have been properly performed according to the certificates of the officers of this department duly appointed to supervise the same.

"ROLLIN M. SQUIRE,

"Commissioner of Public Works."

"I certify that the work mentioned in the contract herein specified has been completed according to the terms of said contract and is satisfactory.

"ROLLIN M. SQUIRE,

"Commissioner of Public Works."

The judgment recovered is for the sum thus certified to be due with interest added.

It is not asserted by the answer that the contract was fraudulently procured, or that it was for any reason invalid. On the contrary, the defendant relies on it and asserts that the plaintiff cannot recover because of a failure of performance on the part of his assignor. In order that it shall clearly appear in what respect it is claimed the contractor has failed to perform in such substantial respect as to prevent a recovery in any sum whatever, it is desirable in this connection to call attention to the situation of the contract and the parties to it at the time of the trial.

Nearly four years before that time the officers named by the defendant in its contract made the certificates which, by its terms, were to determine the final completion of the con-

Opinion of the Court, per PARKER, J.

tract, and the right of the contractor to receive his compensation within thirty days thereafter, the commissioner of public works specially certified that the contract had been completed according to its terms, and was satisfactory.

About that time the defendant entered into, and has since continued in, possession of the street. It should be further observed that the defendant does not claim that the certificate made by the engineer, surveyor and superintendent of street improvements, over states the quantity of material of any kind therein certified; nor is it claimed that plaintiff has recovered judgment in this action for excavations made, or work of any kind done which was not in fact performed. In other words, it is not disputed that plaintiff's assignor actually removed all the material and did all the work for which he has recovered judgment; nor is it asserted that the work was not performed as directed by the officers having charge of the execution of the contract for the defendant.

But it is contended that the contractor did not excavate the rock to two feet below the grade. The contract provides that "the street is to be regulated two feet below the grade where there is rock, in sections of not less than one hundred feet in length for the full width of the street at a time, and is to be examined by the surveyor before placing any filling therein, after which earth filling is to be filled to grade. Any portion of the street not thus regulated and properly examined will not be received as finished."

It is not disputed, but the earth was removed from the street; rock excavated; examination made by the surveyor; the earth brought back and filled up to the grade required by him; nor that the work was not declared to be properly done, and received as finished after it was done; neither is it claimed that the officers of the defendant have at any time suggested to the contractor or his assignee that there was some mistake or oversight, at the time of the making of the certificates, to the effect that the contract had been completed, at the same time insisting that, notwithstanding their execution and delivery to him, further work should be done.

Opinion of the Court, per PARKER, J.

So appellant's contention amounts to this, that notwithstanding the defendant made a contract by which it agreed to pay for the doing of certain work, if done in substantial compliance with the terms of the contract, and to the satisfaction of the commissioner of public works, upon a certificate by him to that effect, together with certificates by the surveyor and superintendent of streets; and notwithstanding the making of such certificates and the taking of possession by the defendant of the completed work that it may put in issue, the contractor's assertion of performance, by calling a witness to testify that he has made an examination and found rock nearer to the established grade than two feet in a number of places, the quantity on the entire work being estimated by him at 650 yards. That upon such evidence it may wholly defeat a recovery.

At the threshold of its contention the defendant is confronted with the difficulty that its pleading does not present the issue on which its reliance is sought to be placed.

The answer admits the making of the contract; the making and delivery of the certificates by the four officers named in the contract; payment thereon by the city.

It further admits "that the said work has been accepted by the commissioner of public works, acting on behalf of the defendants, and that more than thirty days have expired since such acceptance; but it alleges on information and belief that such acceptance was on or about the 7th day of May, 1885, instead of the date named in the first paragraph of the complaint," and it further alleges, among other things, "that all of the earth and rock excavation in the complaint in this action, and in the said contract referred to, was completed before the 6th day of February, 1885, and the whole of the rock excavation provided for by said contract and described in the complaint herein, was completed on or before the 7th day of May, 1885."

It cannot avail the defendant on this review that, notwithstanding the admission of the answer which, with the evidence given, fully supports the determination of the court in directing a verdict in favor of the plaintiff, the testimony was

Opinion of the Court, per PARKER, J.

received on which it founds its claim of right to go to the jury. For such testimony was seasonably and properly objected to by the plaintiff on the ground that it was not admissible under the pleadings. Its reception was error, and the plaintiff having duly excepted to the rulings, this court is precluded from considering it for the purpose of a reversal.

If it be assumed that the pleadings permitted the introduction of evidence presented by the defendant, we should still reach the conclusion that it was not error for the trial court to direct a verdict.

The appellant's position assumes that a literal compliance with the specifications forming a part of the contract was essential to complete performance under the contract. We do not so read it, and shall briefly call attention to some of its provisions which we deem controlling in that direction. In the first place the proposal intended to inform bidders not only of the character, but the general amount of work to be performed ; time of performance and other essential features of the contract to be subsequently entered into states that "bidders will be required to complete the entire work to the satisfaction of the commissioner of public works and in substantial accordance with the specifications here annexed and the plan therein referred to."

Immediately following the stipulation in the contract on the part of the contractor, that he admits and agrees that the work to be done as stated in the proposals is approximated only, and that he will not assert any misunderstanding in regard to the depth of excavations or nature of materials, it is declared "and he covenants and agrees that he will complete the entire work to the satisfaction of the commissioner of public works, and in substantial accordance with said specifications and the plan therein mentioned."

The first clause in the specifications reads, "the street for its whole width is to be regulated and graded *where required* in accordance with the plans and profile of the said street." By its terms the commissioner of public works was empowered to designate the time when the work should commence; was

Opinion of the Court, per PARKER, J.

given power to suspend the work; to order it commenced again; to declare it abandoned; to consent to its being sub-let or assigned by the contractor; and invested with the right to declare the same null and to re-advertise and re-award it. While it is agreed that the commissioner shall have among other powers those already enumerated, the contractor further directly agrees to do work not described in the specifications if required to do so by the commissioner of public works.

One of the subdivisions of the contract having in contemplation the possible desirability of doing other work than provided for in the contract provides that other persons may be employed to do such work and the contractor "will suspend such part of the work herein specified, or will carry on the same in such a manner as may be ordered by the said commissioner."

It is also agreed that if within six months after the acceptance of the work, if in the opinion of the commissioner, repairs are required and notice to make them given, the contractor "will immediately commence and complete the same to the satisfaction of said commissioner."

It was covenanted that the city should retain the sum of twenty-five cents per linear foot of the work to be done as security for repairs, and that it might be expended "in the manner hereinafter provided for in making such repairs to the work done under this agreement, as the said commissioner of public works may deem necessary."

Under the heading "work and material must agree with specifications," is the following: Party of the second part "agrees that the work shall be performed in the best manner, and the stone, sand and other material of which the work is composed shall be of the best kind, and that a sufficient number of persons shall be at all times employed to execute the work with due dispatch, the whole to be done to the satisfaction of the commissioner of public works; and any materials furnished or work done not satisfactory to the commissioner of public works shall be removed and satisfactorily replaced by the said party of the second part."

These provisions are not in conflict with other portions of the contract, but on the contrary are supported by and consistent with them, and establishes that the specifications were not necessarily to be exactly, but substantially performed, in accordance with the specifications and to the satisfaction of the commissioner of public works.

Thus it was stipulated not only that the work should be done to the satisfaction of one of defendant's officers, but that as the representative of the defendant and acting for it, he should determine whether the contract was substantially complied with.

Now the uncontradicted evidence is that the surveyor or his assistant gave to the contractor the grades to which the excavations were conformed. The defendant distinctly provided in its contract that its surveyor should be one of the officers to represent its interests in the execution of the contract and that his certificate that the work had been completed should be essential to the right of the contractor to demand compensation for his work. Not only does it appear that the grades were furnished by the surveyor or his assistant, but it also appears that he subsequently certified to the completion of the work as provided by the contract. That the contractor was at liberty to follow the directions of the officers whom the defendant had stipulated to represent it and speak for it in the execution of the contract is manifest not only from the provisions of the contract already referred to, but also from two others to which allusion may be briefly made.

Under the heading "change of grade," it is conditioned that "the said party of the second part hereby further agrees that in case the grade of the street shall be changed during the progress of the work, he will conform to the altered grade at the prices specified herein as far as they are applicable."

Under the heading "excavating," it is said "the street is to be regulated two feet below the grade where there is rock * * * and is to be examined by the surveyor before placing any filling thereon, after which earth filling is to be filled to grade. Any portion of the street not thus regulated and properly examined will not be received as finished."

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It may be observed that the undisputed evidence is that the grades were given by the surveyor or his assistant; examination made after the excavation was completed and before any filling was done; the filling subsequently made to grade, and the work accepted. It is quite clear that it was the intention of the parties under this contract that the contractor should in its execution be governed by the direction of such of defendant's officers as it declared in the contract should represent it. So if the grade should be mistakenly given to the contractor by the surveyor and the work should be done in conformity therewith, and certificates of completion afterwards given, the defendant could not thereafter object that the plaintiff should not be compensated because, as the result of a misdirection by its officers, the specifications had not been literally complied with.

A similar contract was considered by this court in *Mulholland v. Mayor, etc.* (113 N. Y. 681).

The engineer made a mistake in furnishing the contractor with the grade, with the result that after the work had been done, the city's officers having in the meantime discovered the error, the contractor was required to excavate deeper, and as it appears, at greater expense to him than would have been incurred had the true grade been given him in the first instance.

It was held that he was entitled to recover the value and amount of the extra labor and increased expense. Necessarily the foundation of that decision rests on the proposition that, under the contract, the contractor is authorized to follow the directions of the officers named in its contract to represent it. Otherwise the court must have held that defendant could not recover for extra work because the depth of the excavation was specified in the agreement and, therefore, could have been followed. Such a construction of the contract seems to be required by its terms and is just to both parties.

Again, the city not only provided for a substantial performance in accordance with the specifications; stipulated that the commissioner of public works should determine what should

Opinion of the Court, per PARKER, J.

constitute a performance; provided for daily inspection; for right to change the grade; for an examination by a surveyor after excavation and prior to placing the filling thereon; but also for a certification by three of its officers, or employees, to wit, the surveyor, inspector and superintendent of street improvements in charge of the work, and commissioner of public works, that the work had been completed.

The city required the contractor to agree, and he did, that after completing the work he should not demand or receive payment until such completion "be duly certified by the surveyor, inspector and superintendent of street improvement in charge of the work, and until each of the other stipulations hereinbefore mentioned are complied with and the work completed to the satisfaction of the commissioner of public works and accepted by him."

After the making of such certificates and the acceptance of the work by the commissioner of public works, the defendant agreed to pay on or before the expiration of thirty days from the time of the completion of the work. The certificates thus provided for have been made. The commissioner of public works has accepted the work. That such certificates were made in good faith is not questioned, nor is it claimed that there was any mistake of fact therein. The defendant, therefore, cannot now challenge the decision of those whom it contracted should determine the question of performance or non-performance, and upon whose determination it promised to make payment.

The provision of the contract upon which defendant largely founded its argument in support of a reversal, if requiring the construction contended for, might present an interesting question, because such provision would then be brought in conflict with other portions of the contract.

It is claimed that it operates to so relieve the city from the effect of its stipulation touching the question of performance as to permit it to challenge the allegation that the work has been completed, notwithstanding the making of the certificate and the acceptance of the work by the commissioner of public

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works. But it does not require and should not receive the construction asked for. It provides that the defendant nor any of its officers nor departments shall "be precluded or estopped by any return or certificate made or given by any engineer, surveyor, inspector or other officer, agent or appointee of said department of public works, or said parties of the first part under or in pursuance of any thing in this agreement contained, from at any time showing the true and correct amount and character of the work which shall have been done and materials which shall be furnished by the said party of the second part or any other person or persons under this agreement."

If it had been intended to provide that the city's agreement to be bound by the certificates of its officers and acceptance by the commissioner of public works, should be nullified by the subsequent objection of any officer or department, it could and doubtless would have been plainly and tersely expressed. So that the contractor should understand that while the contract prevented him from demanding compensation until after the city's officers should make certain certificates, the city's agreement was only to pay within thirty days after making of the certificates in case the defendant or some department or officer of the city should not object, in which event some tribunal not provided for in the contract should be called on to determine whether there had been performance, to decide whether the work had been done to the satisfaction of the commissioner of public works. That in such case the promise in the contract that the commissioner should himself decide whether he was in fact satisfied, should go for naught and some one else should decide it for him.

But these suggestions need not be extended. The clause which we have quoted is entirely separated from the concluding portion of the contract which undertakes to provide how performance shall be ascertained and bindingly declared, and was not intended to trespass on its provisions.

It does not provide that such certificates shall not estop the defendant from showing failure of performance, but it shall

Statement of case.

not estop it from showing the true and correct amount and character of the work done and materials furnished. Not that the city can prevent a contractor from receiving what has been earned under a contract when the certificates shall have been given, but that it may prevent a recovery for a greater amount than the work was worth.

Therefore it reserved the right to challenge. 1. The amount of the work. This would include the number of yards of earth and rock and number of feet of curbing, etc.

2. The character of the work. This would enable the defendant to show in a proper case that rock had been estimated as earth, or *vice versa*. By this provision, therefore, it is left open to the defendant to call upon the court to so correct the estimates as to quantities and kinds of materials as to prevent a recovery for any greater sum under the contract than was therein stipulated for.

But that feature of the contract is of no importance here for as we have said in another portion of the opinion it is not disputed, but the work for which plaintiff claimed to recover was of the character and amount claimed.

The judgment should be affirmed.

All concur, LONDON, J., in result.

Judgment affirmed.

SETH WELLS, Respondent, v. JOHN W. GARBUTT, Appellant.

Where the owner of two parcels of land imposes a burden upon one for the benefit of the other, and then conveys the former by absolute and unqualified deed, no easement in favor of the land retained against the parcel conveyed will be implied, unless at the time of the conveyance the burden was apparent, and is strictly necessary for the enjoyment of the parcel retained.

Lampman v. Mills (21 N. Y. 506), limited and distinguished.

In an action to restrain defendant from so obstructing the waters of a creek as to cause them to flow back upon plaintiff's land, it appeared that G. formerly owned plaintiff's lot and that of defendant below. Upon the lot now owned by defendant was a mill and a dam which had been maintained for many years, which dam, when the pond was full, set back the

132	430
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134	388
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182	430
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162	127
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Statement of case.

waters of the creek upon the lot now owned by plaintiff. G. executed a mortgage upon part of plaintiff's lot, covering that portion so overflowed, without reserving the right to flow any part of it. At that time the mill was in operation, but the water in the pond was low. G. thereafter conveyed both lots to defendant. The mortgage was foreclosed, and, pursuant to judgment of foreclosure, the mortgaged premises were sold and conveyed by referee's deed to plaintiff. There was no reservation in the judgment, or in the referee's deed, of any right to flow any part of the premises. Prior to the sale and conveyance, the dam was carried away, and it did not appear that, at the time of the execution of the mortgage or the referee's deed, any portion of plaintiff's lot was overflowed, or that there was any visible sign of previous overflow. Defendant commenced rebuilding the dam with intent to carry it up to its former height. It did not appear that, in order to operate defendant's mill with substantially undiminished efficiency, it was necessary to maintain the dam at full height, or at such a height as would cause the overflow of plaintiff's land. *Held*, that there was no implied reservation of the right to overflow; and that a permanent injunction was properly granted.

(Argued March 11, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from so obstructing the waters of Allen's creek, in the town of Wheatland, county of Monroe, as to cause them to set back upon the lands of the plaintiff.

The trial court found that Allen's creek is a natural stream of water flowing in an easterly direction across lot 37 to lot 38, and thence across lot 43 in said town. The defendant is the owner of a flour and plaster-mill on lot 43, the machinery of which is propelled by the water of said stream, impounded by a dam on said lot, which, until the year 1887, set back the water across lot 38 onto lands now belonging to the plaintiff in lot 37. For more than fifty years prior to 1887, there was a dam, rebuilt at intervals, on substantially the same site, creating a water-power used to run mills owned by the defendant

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and his grantors continuously since 1828. Prior to July 1, 1856, Phillip Garbutt, father of the defendant, owned lots 37 and 43, with the mill and dam on the latter, and had acquired the right from the owner of lot 38 to cause the water to flow back over it. On the day last named, said Phillip Garbutt gave a mortgage upon forty-one acres of lot 37 to one Fairchild, to secure the payment of the sum of \$1,600, without reserving the right to flow any part of the lands thus mortgaged, which laid on both sides of the stream. At the date of said mortgage the mills were in operation, and the dam, maintained by Phillip Garbutt on lot 43, when it was filled, set back the water across and beyond the mortgaged premises.

In 1858, Phillip Garbutt conveyed lot 37 to the defendant, subject to said mortgage, and at the same time he also conveyed to him the mill property on lot 43. June 27, 1888, pursuant to a judgment of foreclosure based upon said mortgage, the premises therein described were sold and conveyed to the plaintiff, who has ever since owned the same in fee and has been in possession thereof. Neither in said judgment nor in the referee's deed was there reserved to the defendant any right to cause the water of Allen's creek to flow back onto any part of the premises so conveyed to the plaintiff. While the defendant owned lots 37 and 43, and until within a short time before the foreclosure sale, he maintained said dam at its accustomed height, the same as it had existed continuously since 1828. In 1887, a portion of the dam was carried away by high water, and when this action was commenced the defendant had partly rebuilt it, and intended to carry it up to its former height, the effect of which would be "to set back the waters to some extent upon that part of lot 37 owned by the plaintiff, and to interfere with and obstruct the natural flow of waters of Allen's creek thereon."

After finding the foregoing facts, in substance, the trial court found as conclusions of law that there was "no implied reservation to the defendant of the right to set back the waters of Allen's creek upon the lands of the plaintiff, which he bought at the foreclosure of said mortgage;" that the defend-

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ant had no right to so set back said waters as to flood any part of plaintiff's premises, "or to render any portion thereof wet, spongy or unfit for agricultural purposes." A permanent injunction was awarded accordingly. As no part of the evidence appears in the appeal book, the questions involved are raised by exceptions to the conclusions of law.

Further facts are stated in the opinion.

P. M. French for respondent. If it can be claimed that the defendant has acquired any right to overflow lot 37 by prescription, such right has been acquired since the giving of the mortgage and has been cut off by the foreclosure of the mortgage as the defendant was a party to the foreclosure action. (Code Civ. Pro. § 1632; 3 R. S. [6th ed.] 199, § 102; *Smith v. Gardner*, 42 Barb. 356, 366; *Rector v. Mack*, 93 N. Y. 488; *Pardee v. Steward*, 37 Hun, 262; Abb. Tr. Ev. 829.) The question whether the judgment in the action between Philip Garbutt, set up in the answer, is a bar to this action, is not raised by this appeal. (*Bell v. Merryfield*, 109 N. Y. 209; *Moore v. City of Albany*, 98 id. 409; *Marsh v. Masterton*, 101 id. 407.) The plaintiff as the owner of lot 37 upon both banks of Allen's creek is entitled to the uninterrupted flow of its waters in the channel of the stream contiguous to his premises, as it has been accustomed to flow, and his right to maintain an action to restrain the infringement of any rights of property which he possesses as such riparian owner is unquestioned. (*Smith v. City of Rochester*, 92 N. Y. 473; *Pixley v. Clark*, 35 id. 520; Gould on Waters, §§ 209, 210; *Wilson v. City of New Bedford*, 108 Mass. 261.) A grantor who has imposed a burden on one part of his land for the benefit of another part will, upon a sale of the servient land, not be deemed to have reserved by implication the right to continue the burden for the benefit of the dominant part retained by himself, and consequently the defendant is entitled to no easement in the plaintiff's land. It could be created only by grant or reservation. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 Barb. 464; *Dillman v. Hoffman*, 38 Wis. 572, 574; *Burr v.*

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Mills, 21 Wend. 290; *Outerbridge v. Phelps*, 13 Abb. [N. C.] 117, 133; *Shoemaker v. Shoemaker*, 11 Abb. [N. C.] 80, 85; *Sloat v. McDougall*, 30 N. Y. S. R. 912; *Longendyke v. Anderson*, 101 N. Y. 630; *Mitchell v. Seipel*, 53 Md. 251, 269; *Stevens v. Orr*, 69 Me. 323; *Crossley v. Lightowler*, L. R. [2 Ch.] 478; *Russell v. Watts*, L. R. [25 Ch. Div.] 572; Washb. on Eas. & Serv. [4th ed.] 105; *Brown v. Alabaster*, L. R. [37 Ch. Div.] 504, 505; *B. D. & D. B. Co. v. Ross*, L. R. [38 Ch. Div.] 310; *Hathorn v. Stinton*, 25 Am. Dec. 228; *Preble v. Reid*, 17 Me. 169; *Warren v. Blake*, 54 id. 276; *Hammagrd v. Woodman*, 66 Am. Dec. 219; *Root v. Wadhams*, 107 N. Y. 394; *Ogden v. Jennings*, 62 id. 526; *Green v. Collins*, 86 id. 246; *Griffiths v. Morrison*, 106 id. 165.)

John J. Snell for appellant. The court erred in finding that there was no implied reservation to John W. Garbutt, of the right to set back the water of Allen's creek upon the lands of said plaintiff, which he bought at the foreclosure sale. (*Lampson v. Milks*, 21 N. Y. 506; *Tabor v. Bradley*, 18 id. 109; *Curtiss v. Ayrault*, 47 id. 73.) The mortgage through which plaintiff derives his title should be construed (so far as the parties thereto and those claiming under them are concerned) as a deed. (*Rector v. Mack*, 93 N. Y. 488.) Easements will pass or a servitude be imposed by an implication of law, although not expressly named in the grant. (*Cihak v. Klekr*, 117 Ill. 643; *Kelly v. Dunning*, 43 N. J. Eq. 62; *Kripp v. Curtis*, 71 Cal. 62.)

VANN, J. Both parties unite in the position that the plaintiff acquired through the sale in foreclosure the entire estate of both mortgagor and mortgagee, as of the date of the mortgage. (*Rector, etc., v. Mack*, 93 N. Y. 488; *Pardee v. Steward*, 37 Hun, 259, 262; 2 R. S. 192, § 158; Code Civ. Pro. § 1632.) The question presented for decision, therefore, is whether a riparian owner, who has imposed a burden on one part of his land for the benefit of another part, upon conveying the former without express reservation, should be held

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under the circumstances of this case, to have impliedly reserved the right to continue the burden. As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases. Some learned judges, in considering what may be termed an implied grant, as distinguished from an implied reservation, without, however, mentioning the distinction, have used language apparently applicable to all easements existing by implication, when in fact intended to be limited to those existing in favor of a grantee. Others in deciding that an easement was impliedly created by a grant and conveyed to the grantee, have gone farther in their discussions than the point involved required and have broadly declared the rule to be reciprocal and applicable alike to benefits conferred and burdens imposed, provided the marks of either were open and visible. Such was the case of *Lampman v. Milks* (21 N. Y. 506), where the discussion outran the decision, for, while it was decided that, on the facts then appearing, an easement should be implied in favor of the grantee, against the grantor and his remaining lands, it was asserted that under like circumstances an easement would be implied in favor of the grantor, against the grantee and his lands. The latter proposition was involved neither in the case decided, nor in any of those relied upon to support it, except such as have since been overruled, either expressly or impliedly. So much has been written upon the general subject of implied reservation that a review of the authorities is no longer practicable in an opinion of reasonable length and we shall content ourselves by announcing the rule applicable to the facts of this case and citing a few out of the many authorities upon which it is based.

Where the owner of two parcels of land conveys one by an absolute and unqualified deed, we think that an easement will be implied in favor of the land retained by the grantor and against the land conveyed to his grantee, only in case the bur-

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den is apparent, continuous and strictly necessary for the enjoyment of the former. (*Outerbridge v. Phelps*, 13 Abb. [N. C.] 117; *Shoemaker v. Shoemaker*, 11 id. 80; *Scrymser v. Phelps*, 33 Hun, 474; *Dales v. Ceas*, 5 W. Dig. 400; *Burr v. Mills*, 21 Wend. 290, 292; *Sloat v. McDougall*, 30 N. Y. S. R. 912; *Butterworth v. Crawford*, 46 N. Y. 349; *Longendyke v. Anderson*, 101 id. 625, 630; *Buss v. Dyer*, 125 Mass. 287; *Mitchell v. Seipel*, 53 Md. 251; *Burns v. Gallagher*, 62 id. 462; *Brown v. Burkenmeyer*, 9 Dana, 159; *S. C.*, 33 Am. Dec. 541; *M' Donald v. Lindall*, 3 Rawle, 492; *Dillman v. Hoffman*, 38 Wis. 575; *O'Rorke v. Smith*, 11 R. I. 264; *Cooper v. Maupin*, 35 Am. Dec. 464, note; *Collins v. Prentice*, 15 Conn. 39; *S. C.*, 38 Am. Dec. 61; *Wheddon v. Burrows*, L. R. [12 Ch. Div.] 31; *Crassley v. Lightowler*, L. R. [2 Ch. App.] 478; *Suffield v. Brown*, 4 DeGex, J. & O. 185; *Russell v. Watts*, L. R. [25 Ch. Div.] 572; *Brown v. Alabaster*, 37 id. 504; Washburne on Easements, 104 [4th ed.]; Gould on Waters, §§ 357, 362; 6 Am. & Eng. Encyc. 143; 4 R. S. [8th ed.] p. 2491, § 1.)

The trial court found "that at the time of the making and execution of the said mortgage said mills were in operation and there had been maintained a dam across said creek through said lot 43, which set the water back up the creek to lot 37." It was not expressly found, however, that there was any apparent overflow at the time when the mortgage, or the deed, was given, or that the mortgagee or the grantee had any notice of the facts when either instrument was accepted. While the dam was high enough to overflow the forty-one acres when the pond was full, it does not appear, unless by implication, that any standing water was visible at the date of the mortgage, or that there was then any visible sign indicating "to a person reasonably familiar with the subject, upon an inspection of the premises," that water had stood there in the past. (*Butterworth v. Crawford*, 46 N. Y. 349.) At the date of the deed the dam was not in use, as it had been partly swept away by a freshet. Both the mortgage and the deed were given at a season of the year when the water of streams in this state is

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ordinarily low. Thus it is by no means clear, from the facts as found, that at the date of either instrument upon which the plaintiff's title is founded, there was any visible overflow, or apparent sign of previous overflow. As regularity is presumed, the one who claims that an error was committed, must cause it to clearly appear, or effect will be given to the presumption by affirming the judgment appealed from. (*Tracey v. Altmyer*, 46 N. Y. 598; *Appleby v. Erie Co. Sav. Bank*, 62 id. 12, 18.)

But even if the findings, when liberally construed, show that the alleged easement was apparent and continuous, they utterly fail to bring it within the rule of strict necessity. It does not appear that the water-power of defendant would be materially diminished if he were not permitted to overflow the lands in question. The maximum overflow affects but little more than two acres of plaintiff's land, which, if the dam should be restored, would be rendered "wet and spongy" and unfit "for agricultural purposes." The defendant claims that the capacity of his mill, when the pond is full, is about fifty barrels of flour each day, and that the fall at the bulkhead is eleven feet, but it does not appear what the capacity or fall would be with the overflow restricted to the lands which he has the undisputed right to overflow. We are not informed as to the fall of the stream as it flows through the land affected, the grade of the banks, the depth of the water when the overflow is greatest, or the quantity of water that was accumulated or stored on the two acres by the old dam. For aught that appears the advantage of flowing such a small quantity of land was so trifling as to raise the presumption that the mortgagor willingly abandoned it when he omitted to mention or reserve it from the operation of the mortgage. The doctrine of implied reservation rests upon the presumed intention of the parties as it is gathered from the conveyance, interpreted in the light of the circumstances surrounding them when it was executed and with reference to which, as existing facts, they are supposed to have contracted. If it appeared that the mill could not be operated without overflowing the plaintiff's land,

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it would be cogent if not conclusive proof of that strict necessity, which does not create the easement, but is simply evidence as to the intention of the parties. If, on the other hand, it appeared that owing to the slight declivity the accumulation of water was insignificant and that the mill property was worth substantially as much without the right in controversy as with it, there would be no proof of "necessity" and nothing upon which an implication in favor of the mortgagor or grantor could rest. Even the dimensions of the pond are not furnished us, and we cannot compare its extent with and without the two acres, although it appears to extend partly across one lot and entirely across another before it reaches the lands of the plaintiff. When it is claimed that an easement exists by necessity, evidence of the necessity must be given. (*Stuyvesant v. Woodruff*, 47 Am. Dec. 156; *Gayetty v. Bethune*, 14 Mass. 49, 55; *Elton v. Pitman*, 98 id. 50.)

While absolute physical necessity need not be shown, as in the case of land-locked premises, or the support of a wall, there must be a reasonable necessity, as distinguished from mere convenience. (*Root v. Wadhams*, 107 N. Y. 384; *Hollenbeck v. McDonald*, 112 Mass. 250; *Berry v. Brown*, 6 Cald. 98; *Cooper v. Maupin*, 35 Am. Dec. 464, note.)

But in the case before us, where certainty is required, all is conjecture. There is neither finding nor evidence that, in order to run the mill with substantially undiminished efficiency, it is necessary to maintain the dam at such a height as would cause the water to flow over the plaintiff's land.

Upon the facts as found, we think it would be unreasonable to hold that the mortgagor intended to reserve any right in the nature of an easement over the mortgaged premises, or that the mortgagee understood when he accepted the security that it was cut down in extent and reduced in value by the fiction of an implied reservation.

The judgment should be affirmed, with costs.

All concur, except HAIGHT, PARKER and LONDON, JJ., dissenting.

Judgment affirmed.

Statement of case.

THE PORT JERVIS, MONTICELLO AND NEW YORK RAILROAD
COMPANY, Appellant, v. THE NEW YORK, LAKE ERIE AND
WESTERN RAILROAD COMPANY, Respondent.

It seems that, under the provision of the General Railroad Act (§ 28, chap. 140, Laws of 1850), authorizing a corporation organized under it "to intersect, join and unite its railroad with any other railway," upon the grounds of the company owning the road so intersected and requiring the latter company "to grant the facilities" needed for the purpose, the right so provided for is an interest in lands and can only be created by a written instrument; a verbal agreement attempting to create it is void, under the Statute of Frauds.

In an action to recover damages sustained by means of the alleged unlawful severance by defendant of the connection of its railroad with that of the plaintiff, to compel defendant to restore the connection and to restrain further interference therewith, it appeared and was found that the original connection between the two roads was under a temporary parol agreement between the companies then owning them by which the owner of plaintiff's road was permitted to make the connection and to use the tracks, depot, yard and turn-table of the other company without charge; subsequently fifty dollars per month was charged for such use; when plaintiff took possession and asked permission of defendant to make use of the accustomed facilities, permission was granted upon plaintiff's agreement to pay \$100 per month, which was paid. Defendant thereafter notified plaintiff that, after a date specified, the use of such facilities could not be continued unless plaintiff would pay \$300 per month therefor, which, not having been paid, defendant, after giving notice to plaintiff to discontinue, itself severed the connection between the two tracks. *Held*, that the complaint was properly dismissed.

(Argued March 15, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This was an action to recover damages from the defendant for unlawfully severing the connection between its railroad track and that of the plaintiff at the village of Port Jervis; to compel the defendant to restore such connection and to restrain further interference therewith.

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On the 2d of September, 1869, the Monticello and Port Jervis Railway Company was organized to construct and operate a railroad from Monticello, in the county of Sullivan, to Port Jervis, in the county of Orange, a distance of about twenty-three miles. The road thus projected was subsequently built, and on the 25th of August, 1875, passed with the rights of the original company, through the foreclosure of a mortgage, to a new corporation organized under the name of the Port Jervis and Monticello Railroad Company. In November, 1886, the road and all its appurtenances was sold by a receiver and conveyed to the plaintiff, which was authorized by its charter to maintain and operate it and also to build an extension thereof.

The defendant is a railroad corporation, operating a railroad extending from the city of New York to Lake Erie, passing through the village of Port Jervis. Said road was owned by the Erie Railway Company from 1868 until 1875, when it passed into the hands of a receiver, and in 1878, it became the property of the defendant through the process of foreclosure.

The Monticello and Port Jervis Railway Company built its own road but did not operate it, having arranged with the Erie Company to manage it and to furnish the rolling stock therefor, in consideration of a certain sum per mile. The track of the former company was connected with one of the tracks of the latter at a point on its land, about 2,200 feet easterly of its passenger station at Port Jervis. The frog for the connection was furnished by the Erie and has been kept in repair by that company and its successors. The trains, after leaving the Monticello road, passed upon the track of the Erie to its passenger and freight station and to its turn-table, where the engines were turned. They also remained in the Erie yard during the interval between their arrival and departure. This method of operation continued until the first of plaintiff's predecessors disappeared through foreclosure proceedings and the second was organized. During this period no charge was made by the Erie Company for the use of its tracks, depot, yard or turn-table. When the Port Jervis and Monticello

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Company came into possession it provided its own rolling stock and operated the road itself. It was permitted by the receiver then in charge of the Erie to use the same facilities that had been extended to its predecessor, without charge, except for the use of the turn-table. When the defendant was organized and took possession of the Erie road permission to use its tracks, yard and depot without charge was withdrawn and the sum of \$50 per month was charged for such use and, although payment thereof was not exacted owing to the financial condition of the plaintiff's predecessor, it formed a part of the monthly statement of the accounts between the two companies. Certain payments, however, were made by the Port Jervis and Monticello Company to various agents of the defendant at Port Jervis until the sale and reorganization in 1886, when the plaintiff took possession, and thereupon asked permission from the defendant to make use of the accustomed facilities. Permission was granted "under an agreement, whereby the plaintiff was to pay the defendant the sum of \$100 per month for such use thereof and was thereafter to make no payments to agents of the defendant for services in connection with the business at Port Jervis." Payments were made at that rate until March, 1888. In the meantime the plaintiff had projected an extension of its road from a point about four miles from Port Jervis to Summitville, where it intended to connect with the Ontario and Western railroad, which was a competitor of the defendant. The plaintiff was notified by the defendant, prior to March 1, 1888, that after that date use of said facilities could not be continued unless the plaintiff would pay \$300 per month therefor. No payment has been made for such use since March, 1888, although the user has continued, except during a short interval, the same as before. June 21, 1888, after a second notice to discontinue had been given, the defendant severed the connection between its track and that of the plaintiff, but on July 20, 1888, the connection was restored pursuant to the terms of a temporary injunction and since then until the trial of this action, the plaintiff has used said facilities, for which it has paid nothing.

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The extension to Summitville has been completed and is substantially ready for operation. No written agreement was ever made for the use by the plaintiff or either of its predecessors of the tracks, yard, depot or turn-table in question, with the defendant or its predecessor.

The trial judge, after finding the foregoing facts, in substance, found as conclusions of law, that the right to use the tracks, etc., was an interest in real estate that could be granted by a written instrument only; that the permission to use said facilities, whether with or without charge, was a license revocable at the will of the defendant and that such license having been lawfully revoked, the plaintiff could not maintain this action. The complaint was dismissed without costs, but the temporary injunction was continued for sixty days to enable the plaintiff to move for a commission under the statute to fix the points and terms of connection between the two roads.

The affirmance by the General Term was placed upon the ground that the evidence, which was to some extent conflicting, abundantly sustained the decision of the trial court and that even if it were conceded that an understanding was reached that terminal facilities should be accorded without charge, no time was specified during which that arrangement should continue.

Further facts are stated in the opinion.

T. F. Bush for appellant. The original intersection which was established by mutual arrangement between the then existing corporations, was in strict conformity to the statute which created, regulated and defined the rights, privileges and franchises of both corporations. It was a practical location of the terminus of the plaintiff's road, and the rights of the parties were thereby permanently established. The law relating to estates or interests in real property arising out of private contracts, has no application whatever to this case; the whole matter is governed by the Railroad Act. (Laws of 1850, § 28; *In re N. Y., L. E. & W. R. R. Co.*, 44 Hun, 215; *Att.-Gen. v. N. A. Ins. Co.*, 82 N. Y. 172; *In re Kerr*, 42 Barb. 119;

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W. A. Co. v. Barlow, 63 N. Y. 70, 71; *Schurr v. N. Y. S. Ins. Co.*, 41 N. Y. S. R. 90; *R., W. & O. R. R. Co. v. O. S. R. R. Co.*, 16 Hun, 445.) The oral agreement being fully executed by the Monticello Company, should be enforced in equity. (*Miller v. Ball*, 64 N. Y. 291; *Freeman v. Freeman*, 51 Barb. 306; 43 N. Y. 34; *Patterson v. Copeland*, 52 How. Pr. 460; *Schroeder v. Wanzer*, 36 Hun, 423; *Van Arsdale v. Perry*, 21 Wkly. Dig. 116; *Willston v. Willston*, 41 Barb. 635.) There is nothing in the transaction in the nature of a revocable license. It was manifestly the intention of all parties, and clearly within the contemplation of the statute, that the intersection, when established, should be permanent. (*Weisman v. Lucksinger*, 84 N. Y. 38.) The agreement made in December, 1886, for the payment of \$100 per month operated under the statute to fix the right of the plaintiff so long as it performed the agreement. (*R., W. & O. R. R. Co. v. O. S. R. R. Co.*, 16 Hun, 445.)

Lewis E. Carr for respondent. So far as there was conflict in the testimony, the affirmance by the General Term concluded the plaintiff. Such conflict might be considered by the General Term, but in this court the facts may not be reviewed. (*People ex rel. v. French*, 123 N. Y. 636, 637; *Fluck v. Village of Green Island*, 122 id. 107, 117.) The right claimed by the plaintiff is to the permanent and inalienable use of the railroad tracks, yard, station and turn-table of the defendant for the plaintiff's benefit. Such right, if it exists, is an interest in real estate. (*Nellis v. Munson*, 108 N. Y. 453; Laws of 1881, chap. 293.) Giving full force and effect to the testimony, the logical result from the findings of fact is that such permission as was at any time given to use the defendant's property at Port Jervis was a license which was revocable at the will of the defendant. (*Mumford v. Whitney*, 15 Wend. 380; *Pitkin v. L. I. R. R. Co.*, 2 Barb. Ch. 221; *Miller v. R. R. Co.*, 6 Hill, 61; *Selden v. D. & H. C. Co.*, 29 N. Y. 634; *Cronkhite v. Cronkhite*, 94 id. 323, 328; *Wiseman v. Lucksinger*, 84 id. 31; *Eckerson v. Crippen*, 110 id. 585, 591, 592.) The

agreement in November, 1886, for this use for \$100 per month rises no higher and gave no additional or more permanent tenure. (*Eckerson Case*, 110 N. Y. 585; *Wiseman v. Luck-singer*, 84 id. 31.) There was no agreement on the part of the Erie Company which can be enforced in equity. The right claimed is to the perpetual use of the defendant's real estate. Such a right could not be created by the agreement or act of any officer of the Erie Company. Its origin must be in the agreement or act of the corporation. (*Hoyt v. Thompson*, 5 N. Y. 320.) Equity will enforce a parol agreement for an interest in real estate only where special circumstances exist, and the agreement is clear and precise in its terms as to the rights sought to be obtained. Here the agreement is of the most uncertain and indefinite character. (*Wiseman v. Luck-singer*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 id. 323, 327; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 27.) The fact that the licensee has expended money in constructing works in apparent reliance on the license, furnishes no ground for the enforcement of the agreement for use. (*Babcock v. Utter*, 1 Abb. Ct. App. Dec. 27, 28.) The agreement for use of terminal facilities, if ever made, was with the first Monticello Company, and when the scope of the use was enlarged or changed, the Erie Company and its successors were no longer bound by it. (7 Wait's Act. & Def. 205; *Wheelock v. Noonan*, 108 N. Y. 179; *Kissicker v. Mours*, 36 Penn. 313.) The agreement of November, 1886, was not irrevocable under the statute relating to connections between railroads. The plaintiff is not in a position where it can avail itself of that agreement as one settling the points and terms of connection between the roads of the plaintiff and defendant. (Laws of 1850, chap. 140; 3 R. S. [8th ed.] 1751, § 28; *Williams v. R. R. Co.*, 16 N. Y. 97.)

VANN, J. The act under which both parties to this action, and their predecessors, were organized, provides that every corporation formed thereunder shall have power "to intersect, join and unite its railroad with any other railroad before con-

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structed, at any point on its route and upon the ground of such other railroad company, with the necessary turnouts, sidings and switches and other connections in furtherance of the objects of its connection." It further provides that "every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections and *grant* the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the line or lines, the grade or grades, points and manner of such * * * connections, the same shall be ascertained and determined by commissioners to be appointed by the courts." (L. 1850, ch. 140, § 28; 3 R. S. [8th ed.] 1739.)

The learned counsel for the plaintiff claims that pursuant to this statute "upon the construction and completion of the railroad now owned and operated by the plaintiff, in the year 1871 a connection and intersection was made between the said road and the road now occupied and operated by the defendant, by a mutual agreement between the railroad companies then owning said roads respectively, and that it was no part of said agreement that any sum whatever should be paid for the said connection or intersection," and he excepted to the refusal of the trial court to so find upon his request. While it is not claimed that any written agreement was made, it is insisted that by a verbal arrangement, quite indefinite as to terms and details, the plaintiff's predecessor acquired an irrevocable right to use, without compensation, the railroad track, depot, yard and turn-table now owned by the defendant at Port Jervis. Obviously such a right, if it exists, is an interest in real estate, and can be created only by a written instrument, unless, as the plaintiff claims, the Statute of Frauds has no application to the subject. Apparently the statute applies, because such agreements are not expressly excepted from its operation. The word "grant," as used in that part of the Railroad Act already quoted, indicates the nature of the agreement to be made by the two corporations with reference to the intersection

of their roads. No other word suggesting the character of the arrangement is used. If the companies can agree, the established road is to "grant the facilities aforesaid" to the intersecting road. Moreover, one of the weightiest reasons to justify the enactment of the Statute of Frauds to regulate agreements between persons, applies with increased force to agreements between corporations, because, being perpetual, they may survive all the witnesses to any transaction. It is unnecessary, however, to now decide this question, as the court found, in effect, that the agreement under consideration was not permanent, but temporary and "permissive only." If this conclusion was justified by the evidence, it necessarily defeats a recovery by the plaintiff.

The testimony mainly relied upon by the plaintiff was that of Mr. Wheeler, the president of the original company during the first year of its existence, and Mr. Ludington, a director. About a month after the first road was organized these gentlemen called on Jay Gould and James Fisk, at that time president and vice-president, respectively, of the Erie Company. Their action was not requested by the board of directors, but was purely voluntary. Mr. Wheeler testified that they said they could not bond the town of Forrestburg unless they had certain pledges in relation to the connection with the Erie road; that such connection, as stated, was "full terminal facilities, to run on their track, have the use of their switches, depot, turn-table and everything necessary for passenger and freight business;" that Mr. Fisk, who "did the principal talking, * * * said they would do it; that we should have these facilities and they would run the road until we were able to put on the rolling stock ourselves, at a very liberal charge; that we should have these facilities free of charge;" but repairs were to be paid for. This was at the first interview, and at the second, about a month later, Fisk inquired about the the prospect for tonnage and passenger traffic "in case they helped us build the road," and promised to send an expert to examine the quarries and timber land on the route. He sent a man accordingly, and afterward said he was satisfied

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and that "they would do what they could." "It was repeated at every interview I had with him that we should have the terminal facilities free of charge and that they would run the road until we got ready to stock it ourselves, and that then we should have the terminal facilities free of charge." On his cross-examination, Mr. Wheeler omitted the most important part of the various interviews as sworn to by him on his direct, although professing to state all that he could remember. He further testified that while no report was made to the board of directors "the fact that we had obtained these assurances from the Erie Company was communicated to the directors of our company in the way of general conversations with them." No other witness remembered any such agreement as Mr. Wheeler swore to. Mr. Ludington, who was with him at the first interview with Fisk and Gould, thought that it related to getting their consent to bond the town of Deerpark, in which the Erie Company was a large taxpayer, and to obtaining a subscription towards building the road and, in fact, such consent was given and a subscription of \$10,000 made. When asked what was said about terminal facilities, he answered: "In all the interviews, which were quite numerous, it was assumed rather than expressly agreed, understood, I cannot express in language how it was understood, there was no written agreement; they understood our position, and we took the ground that we expected to enjoy these facilities as one of the reasons why the road should go to Port Jervis against such opposition as we had at home, as Judge Low and all of Middletown was against our going to Port Jervis, and I urged this as a reason why they should help us, and they assented to it." When asked to state the substance of the language used, he said: "The substance was we wanted to build a railroad and without their aid we probably couldn't build it. If we had to build the railroad and get our own terminal facilities, turn-table, machine shops, depots, etc., we couldn't build it. That we would probably have to do if we went the other way, because the Oswego road wasn't even graded at that time, and that was one reason why we desired to get a connection with

them." Nothing more definite upon the subject was stated by this witness.

Mr. Dimmick, who was secretary during the first year until September, 1869, and, after that, president until 1875, when the first receiver was appointed, testified that, although he had repeated interviews with Mr. Gould, and was present at all the meetings of the board of directors, he did not remember that anything was ever said in regard to terminal facilities at Port Jervis, and that he "never heard any claim put forward on the part of the Monticello Company that such arrangements had been made until this plaintiff was shut out of the Erie yard in 1888."

Mr. Niven, the vice-president, and Mr. Goodale, a director of the original company during the entire period of its practical existence, both testified to the same effect. It further appeared that it was the expectation at first to lease the new road to the Erie, and as early as July 13, 1869, a committee was appointed for that purpose, but it was finally arranged that it should be run by that company at a stated sum per mile. During the five years that this arrangement continued the terminal facilities were of no practical importance to the Monticello Company, as the Erie was forced to furnish them for its own convenience. When the reorganization came in 1875, a charge for the turn-table was asserted on the one hand and assented to on the other. When the Erie Company was reorganized in 1878, a charge of \$50 per month was made for terminal facilities, and there was evidence to support a finding that this charge was assented to. When the plaintiff was organized in 1886, a charge of \$100 per month for the use of the same facilities was made by the Erie and for eighteen months was paid by the plaintiff without objection, but in 1888, when the charge was increased to \$300, payment for the first month was made under protest, and since then no payment has been made. No action was ever taken by the board of directors of either company relating to the subject of terminal facilities at Port Jervis. Nothing appears upon the minutes kept by the respective secretaries indicating that

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the subject was ever reported to or considered by either board.

Much more evidence was given tending to support the theory of the defendant that the original arrangement was merely a temporary expedient to enable a new road to start its trains. The frequent changes in the amount charged also indicates its temporary character. It clearly was within the power of the two roads to enter into a temporary arrangement, and the probabilities support that view. The testimony of Mr. Wheeler is probable only on that theory. It can hardly be conceived that the Erie Company would consent to the use of so much of its property without compensation or conditions, unless it had the power to terminate the arrangement at any time. As long as friendly relations continued between the two roads it did not charge what the use of its property was worth, but when the scope of the use was enlarged and a competing line was introduced into its yard and depot, the charge was increased. It had, however, asserted its right to charge and had from time to time increased the amount, and the plaintiff and its predecessors had assented thereto for thirteen years, or during the entire period that the road was operated by them. The position now taken by the plaintiff is inconsistent with that taken by the owners of its road from the time it was built.

We think that the evidence warranted the findings of the trial court, so far as the question under consideration is concerned, and that the affirmance by the General Term leaves us without power to review them.

The trial court found, as a fact, that about March, 1888, the plaintiff agreed to pay the defendant the sum of \$300 per month for the use of said facilities after March, 1888; that the amount so agreed upon was the fair and reasonable value of such use, and that "under such agreement the plaintiff became bound to pay and the defendant became entitled to receive the sum of \$300 per month for the use of said facilities so long as the plaintiff continued so use the same." The court also found, as a conclusion of law, "that the agreement of the

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plaintiff to pay the sum of \$300 per month for the use of said facilities was and is a valid and binding agreement and continues in force and effect so long as such facilities are used, and said agreement is in no wise modified or changed." These findings were duly excepted to by the plaintiff. The judgment entered simply dismissed the complaint and vacated the temporary injunction.

Upon the argument, the counsel for the defendant consented that said findings of fact and law relating to an agreement by the plaintiff to pay \$300 per month for the use aforesaid might be stricken from the record and the judgment modified accordingly.

After examining all of the exceptions, we think that the judgment should be modified so as to conform to the consent of counsel, as above stated, and, as thus modified, affirmed without costs.

All concur.

Judgment accordingly.

FRANCIS LAHEY, Appellant, v. GOUVERNEUR KORTRIGHT,
Individually and as Trustee, etc., et al., Impleaded, etc.,
Respondents.

The will of K., after providing for the payment of debts, etc., directed that his residuary estate should be divided equally between his wife and children. The executors were directed to divide such residue into as many equal shares as would give two to each beneficiary, to convey one to the beneficiary and retain the other, paying to him or her the income during life; they were also authorized to sell any or all the real or personal estate, and after payment of debts as provided, to invest the proceeds "as they, in their discretion, may deem most for the interest of the parties interested." The executors named in the will renounced and letters of administration with the will annexed were issued to others. By judgment, in an action of partition and for the appointment of a trustee in place of those who had renounced, C. was appointed such trustee and certain lots in the city of New York were set off to him, as trustee, for the testator's two sons, L. and G., who, with the widow, were the only beneficiaries. Subsequently, upon petition of C., in which the beneficiaries joined, he was permitted to surrender the trusts, and L. was appointed trustee of the share of G., while the latter was

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appointed trustee of the shares of L. and the widow, and conveyance was made to them by C. L. and C. contracted to sell the lots in question to plaintiff. In an action to recover back the portion of the purchase-price paid, and expenses, upon the ground of defect of title, *held*, that the will created an express trust (1 R. S. 728, § 55), and the trustees took title to the lands embraced therein and set apart for its purposes; that L. and G. succeeded to this title; that the power of sale was intended to be applicable to the subject of the trust, and, being thus annexed to it in aid of its execution, was taken by the substituted trustees; and that, therefore, they could convey a good title.

Coleman v. Beach (97 N. Y. 545); *In re Bierbaum* (40 Hun, 504); *Sweeney v. Warren* (127 N. Y. 426), distinguished.

Also *held*, that as in the action of partition all the parties interested were before the court, none of them could challenge the title of the trustees to the real estate, which was by the judgment therein made subject to the trust.

(Argued March 17, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made July 8, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term and also affirmed an order granting defendants an extra allowance.

The purpose of the action was to relieve the plaintiff from a contract for the purchase of certain premises in the city of New York, designated as lots Nos. 430, 432, 434, on West 34th street, and to recover ten per cent of the purchase-money paid, also certain charges for auctioneer's and salesroom fees, and expenses for examining the title, upon the alleged ground that the defendants were unable to give a good title. The trial resulted in a judgment for the defendants and for specific performance by the plaintiff.

The facts, so far as material, are stated in the opinion.

Esek Cowen for appellant. The power of sale contained in clause II of the will, was a power for the purpose of paying debts and funeral expenses, and for the convenient distribution or division of the testator's estate. It was never intended to attach to the trust created by the sixth clause of the will, or to

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continue during the entire lives of the widow and children of the testator. (*Kinnier v. Rogers*, 42 N. Y. 531.) The power of sale conferred upon the executors was either a power to sell lands to pay debts, in which case the authority clearly expired before the division of the property, which could not take place until the debts were ascertained and paid, or it was a discretionary power imposing no duty upon the executors which could be enforced by a court of equity. In the latter case no one except the executors named in the will could exercise the discretion. (*In re Bierbaum*, 40 Hun, 504; *Coleman v. Beach*, 97 N. Y. 545; *Mott v. Ackermann*, 92 id. 546; *Cook v. Pratt*, 98 id. 39.)

S. Jones for appellant. All the executors having renounced and refused to qualify, there was no one to execute the trusts, but as a court of equity will never let a trust fail for want of a proper trustee, the Supreme Court possessing general equity powers and jurisdiction had the power to appoint a trustee to execute the trusts. (*Harris v. Rucker*, 13 B. Mon. 564; *Cook v. Platt*, 98 N. Y. 35.) The power of sale at the time it was undertaken to be executed was not an imperative one, but a purely discretionary one, and its execution could not be delegated to another. (*Coleman v. Beach*, 97 N. Y. 545-558; *In re Bierbaum*, 40 Hun, 504.) The title is not so free from doubt upon the questions of law involved as that the purchaser will be compelled to take. (*Fleming v. Burnham*, 100 N. Y. 1; *Irving v. Campbell*, 121 id. 353; *Kilpatrick v. Barron*, 125 id. 751.)

John M. Bowers for respondents. The power of sale given by the will was a general imperative power in trust, which, although discretionary as to the time of execution, could, on the death, removal, resignation or refusal to act of the trustees, be executed by a trustee appointed by the Supreme Court to carry out the trusts created by the will. (1 R. S. 732, 734, §§ 68, 69, 70, 71, 77, 95, 96; *Cook v. Platt*, 98 N. Y. 39; *Farrar v. McCue*, 89 id. 139; *Greenland v. Waddell*, 116 id. 234, 240; *Delaney v. McCormick*, 88 id. 174.) The power

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of sale was to the trustees, and, though imperative, could be exercised as to the time in their discretion. (*Cook v. Platt*, 98 N. Y. 39; *Mott v. Ackerman*, 92 id. 540; *Ward v. Ward*, 105 id. 68; *Tobias v. Cushman*, 32 id. 319; *Robert v. Corning*, 89 id. 225; *Bacon v. Bacon*, 4 Dem. 5.) The original trustees having refused the trust, an order discharging them therefrom was unnecessary. By their refusal to act, the trust vested in the Supreme Court, with all the powers and duties of the original trustees; and the court properly executed the trust by the appointment of new trustees. (*Depuyster v. Clendenning*, 8 Paige, 295; *In re Robinson*, 37 N. Y. 261; *Dunning v. O. N. Bank*, 71 id. 497; *Ross v. Roberts*, 2 Hun, 90.) It is not necessary for the Supreme Court to expressly confer any authority on the new trustee. The appointment carries with it all the authority vested in the original trustee. (*Clark v. Crego*, 51 N. Y. 646; *Farrar v. McCue*, 89 id. 139; *Nugent v. Clune*, 117 Mass. 219; *Boyce v. Adams*, 123 N. Y. 402; *Leggett v. Hunter*, 19 id. 445, 460.)

BRADLEY, J. The subject of controversy has relation to the power of the defendants Kortright as trustees to sell and convey the premises in question. If they possessed adequate power in that respect the plaintiff was properly required by the judgment to complete the purchase, otherwise he was entitled to the relief sought by the action. The disposition of the question is dependent somewhat and mainly upon the provisions of the will of Nicholas G. Kortright, which was admitted to probate in April, 1874. By it, after directing payment of his debts and funeral expenses and satisfaction of his bequest of household furniture, books and plate to his wife, the testator provided that the residue of his property, real and personal, should be equally divided between his wife and children, and directed his executors to divide such residue into as many equal shares as should be necessary to give to each two shares, to convey one of such equal shares to each of them, and to retain the residue of such equal shares in trust for the benefit of his wife and children, and pay to each of

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them during their natural lives respectively the interest or income of one of such shares. He further directed that upon the death of any of those persons, the portion of his or her share remaining in the hands of the executors, should be divided equally among his surviving children and the lawful issue of such of his children as then may have died. And following these provisions were those of the eleventh clause as follows: "I give my executors full power and authority in regard to the investments of my said estate, and for this purpose they are authorized to sell and convey any or all of my real and personal estate, and after the payment of my debts as hereinbefore provided, to invest the proceeds in other real estate or in personal securities as they, in their discretion, may deem most for the interest of the parties interested in my estate." And he nominated and appointed two persons, Minturn and Blunt, executors and trustees. They renounced, and letters of administration with will annexed were issued to Sarah J. Kortright, the widow, and Benjamin Collins. Gouverneur and Lawrence M. Kortright were the only children of the testator, and with the widow constituted the beneficiaries of the residue as mentioned in the will. By judgment in an action for partition and for the appointment of a trustee in place of those who had so renounced, Benjamin Collins was appointed such trustee, and lot 434 West 34th street with other land was set off to Collins as trustee of Lawrence M. Kortright, and lots 430 and 432 West 34th street with other land were set off to him as trustee of Gouverneur Kortright. Several years afterwards upon petition of Collins, in which the beneficiaries joined, he was by the court permitted to surrender the trusts and was released and discharged therefrom. And subsequently Lawrence M. was appointed trustee of the share of his brother Gouverneur Kortright, and the latter was appointed trustee of the respective shares of the widow and Lawrence M. Kortright, and conveyance was made to them as such trustees by Collins, their predecessor in the trust, of the lands not disposed of while he was trustee. These proceedings were regularly and duly had to invest the new trustees

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with the title to the lands which were the subject of the trust, and embraced in them were lots 430, 432 and 434 West 34th street, the lands in question. And the defendants as such trustees caused to be made the sale from which the plaintiff seeks to be relieved. He is entitled to such relief unless the trustees are able by their conveyance to give him a marketable title, which is a title free from reasonable doubt. (*Fleming v. Burnham*, 100 N. Y. 1; *Irving v. Campbell*, 121 id. 353; *Kilpatrick v. Barron*, 125 id. 751.)

The will from which the power of the trustees is derived, created an express trust within the meaning of the statute, as it provided for the receipt by them of the rents and profits or income of lands and the payment of the same over to the beneficiaries during their lives. (1 R. S. 728, § 55.) And for that purpose the trustees took title to the lands embraced within the trust. (Id. 729, § 60; *Brewster v. Striker*, 2 N. Y. 19; *Leggett v. Perkins*, Id. 297.)

This was the situation of the shares in the lands set apart for that purpose. The trustee Collins was succeeded in the title by the new trustees to the lands so held by him at the time he relinquished the trust.

It is, however, insisted on the part of the plaintiff that neither the trustee Collins nor his successors in that relation took any power of sale under the will. The determination of this question depends upon the construction and application of the provisions of the eleventh clause. It is forcibly argued by the learned counsel for the plaintiff that the power of sale given by such clause is not attached to the trust before mentioned, and has no relation to its execution, but that it was intended as a power to the executors as such to be executed only prior to the division of the estate into the shares provided for, and, as such, was one of personal confidence, and could be exercised by none other than the persons designated as executors by the testator, and that when they failed to assume such relation the power became inoperative. It would be less difficult to adopt the view that this was a naked power if it were not for the trust created by the preceding provision of

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the will. But the power of sale given by this provision does not embrace within its terms as expressed, any purpose necessarily executorial; and for the discharge of their duties as executors no reason appears for the exercise by them of the power of sale for the purposes of investment of the proceeds. It is true that the expression in the eleventh clause in reference to the payment of debts of the testator, has relation to the duties of the executors, and the power of sale is in terms broad enough to cover his entire estate. But it did not purport to have been created for use in making the division provided for of the estate. No power was given the executors as such to withhold distribution of the personal property (if any should remain after payment of the debts), or to delay the division of the real estate, or to withhold from the beneficiaries the shares which they were entitled to take and appropriate to their own use. It, therefore, does not appear to have been intended that the power of sale should not survive the division of the estate. The purpose, as given for its execution, had relation to the investment of the proceeds in other real estate or personal securities. While a mere power of sale is discretionary and does not survive the donee of the power, it is otherwise when the power is coupled with a trust. Then it is taken by the trustees, and through the court of equity may be transmitted to their successors in the trust. In the present case the power of sale independent of and disconnected with the trust to receive and apply the rents and profits, would not have survived the renunciation of the persons named as executors. But by reference to the provisions of the will, as well that creating the power of sale as other portions, to ascertain its applicability contemplated by the testator, it seems that this power in its practical and essential purpose was intended to be applicable to the subject of the trust, which was to continue during the lives respectively of the beneficiaries. And being thus annexed to such trust in aid of its execution it would be taken by the trustees. In that view of its relation it is unnecessary to further pursue inquiry into the character of the power. (*Leggett v. Hunter*, 19 N. Y. 445.)

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The cases cited upon the contention that this power was discretionary and could not be taken by the substituted trustees, do not seem to us to have any necessary application to the present case.

In *Coleman v. Beach* (97 N. Y. 545), there was no express trust, and the execution of the power was made expressly dependent upon the will of the grantee. And in *In re Bierbaum* (40 Hun, 504), there was also no trust, but merely a naked power, which was necessarily discretionary. And the same may be said of *Sweeney v. Warren* (127 N. Y. 426), and it was there held that at the time the executor assumed to execute the power of sale there was no legitimate purpose to be accomplished by its execution. In *Mott v. Ackerman* (92 N. Y. 539), the question finally arose whether a conveyance could be made by the administrator with the will annexed, and the court held it could, as the power of sale had been given to the executors for the purpose of paying debts and legacies, and was imperative. In that case there was no trust other than that which came within the powers of the executors as such. In the case at bar the trust created by the will to receive and apply the rents and profits of the land had, in the view taken, an important bearing upon the construction of the power of sale for reinvestment and its purpose. It could be seen that the title to the property subject to the trust would very likely remain in the trustees for many years, and during that time they were charged with an active duty in respect to it. It is quite reasonable to assume on the question of construction that it was in the contemplation of the testator that occasion might within that time, in view of the interests of the present and ultimate beneficiaries, arise for the sale of the specific real estate or some of it and the investment of the proceeds in other property.

This view of the power of sale for the purpose of investment in other property is consistent with the execution of the trust during the lives of those who were to take the income, and seems essential to effectuate the intent of the testator in creating such power. And it appears by the record here that

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the power has been deemed effectual and sales accordingly have been made by the trustees. One such sale has the support of an adjudication. (*Kortright v. Storminger*, 49 Hun, 249.)

It is further urged that although the power of sale may have been by the will vested in the trustees there appointed, if they had assumed the trust, it was not conferred upon the defendant trustees because: (1) Their appointment was made by the court in the exercise of its general equity powers in that respect and not pursuant to the statute upon the subject, and (2) that the power of sale was not included in that conferred upon them by the orders of appointment.

By the judgment of the court Collins was appointed trustee under the will, and as such trustee invested with power and authority to execute the trusts created by it. And upon his petition to be relieved from the trust he was, by order of the court, permitted to surrender his trust and was discharged from liability, etc. This was a resignation within the meaning of the statute pursuant to which the defendants were appointed as new trustees (1 R. S. 731, § 71), and by the terms of the orders appointing them, they respectively were appointed trustees under the will to hold the shares set apart by the commissioners for the benefit of the beneficiaries, and to hold the same in trust for them. The court did not by these orders assume to limit in terms the power of the new trustees or definitely define the manner they should execute the trust. And by reference to the entire record of the proceedings, in that behalf it seems that the purpose was to substitute them as successors to Collins in the trust created by the will, from which, through the action of the court in placing them in that relation, they derived their powers. (*Farrar v. McCue*, 89 N. Y. 144; *Royce v. Adams*, 123 id. 402; *Nugent v. Cloon*, 117 Mass. 219.) A different question would be presented in a case where the powers of the trustees are derived from the general equity jurisdiction of the court. In respect to the action for partition all the parties essential to accomplish it were before the court. (*Meude v. Mitchell*, 17 N. Y. 210; *Brevoort v.*

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Brevoort, 70 id. 136.) At all events, the persons who took the other half were parties to the partition action, and cannot challenge the title of the trustees to the real estate which was made subject to the trust.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES N. WELLS, as Trustee, etc., Respondent, v. FRANCIS HIGGINS, as Receiver, etc., Appellant.

182	459
161	65
132	459
6187	562

Where a charge is correct in part, a general exception thereto without any qualification is not sustainable.

The executors and trustees appointed under and by the will of McC. were, in an action brought for that purpose, removed and a receiver appointed of the rents and profits of the real estate, "freehold and leasehold," and of the personal property, to whom the tenants were directed to attorn, and who was authorized to lease the lands and tenements, etc., pay taxes, assessments and other lawful charges thereon. Subsequently the receiver was removed and defendant appointed receiver in his stead, with the same powers and duties. At the time of the death of McC. he was lessee of certain premises in New York city for a term of years, at an annual rental, payable semi-annually, on the first days of February and September to others. In summary proceedings brought in November, 1879, to remove defendant as tenant and F. as under-tenant for non-payment of rents, they appeared by attorney and by consent a judgment of dispossession was entered against them. In an action to recover rent accruing under the lease after the judgment above mentioned, defendant admitted that he paid to plaintiff the amount of the rent to September 1, 1878, and that in May, 1879, he leased them to F. Held, that from the admissions in the answer it was to be inferred that defendant went into possession at the time he qualified as receiver, and that he paid rent from that time up to the date specified; that it was immaterial as to whether defendant was appointed receiver of the real estate or simply of the rents and profits, as he was appointed receiver of the personalty and the lease went to him as such (1 R. S. 722, § 5; 2 R. S. 82, § 6). and, therefore, that he was liable for the rent accruing up to September 1, 1879.

By the lease, McC. covenanted to pay the Croton water rent and all taxes and assessments on the demised premises. Upon the trial, plaintiff introduced in evidence tax bills, including water rents for the years 1876, 1877, 1878 and 1879; these were objected to as immaterial. Defendant's counsel asked the court to direct the jury to limit the verdict to the

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taxes for 1879; this was denied and said counsel excepted. The court directed a verdict for all the taxes to which said counsel excepted generally. *Held*, that the exceptions were too broad to present the question as to defendant's liability for taxes which accrued prior to his appointment as receiver; and that the objection and motion as made were properly overruled.

(Argued March 17, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 24, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This was an action by a lessor against the receiver of the estate of a deceased lessee to recover the rent reserved and certain taxes, which, by the terms of the lease, were to be paid by the tenant.

By a lease dated February 15, 1871, the trustee of one Clement Moore demised to John H. McCunn certain lands in the city of New York for the term of twenty-one years, reserving an annual rent of \$250, payable in semi-annual payments on the first days of March and September. The lessee covenanted to pay the charges for Croton water and all taxes, assessments and duties imposed during the term by federal, state or municipal authority.

March 28, 1876, in an action brought to construe the will of said McCunn and to remove the executors and trustees nominated therein, one O'Donohue was appointed receiver of the rents and profits of the real estate, freehold and leasehold and of the personal property of said testator. The tenants were directed to attorn to said receiver and the executors to deliver to him all the estate, real, personal and mixed, lately belonging to said McCunn. The receiver was authorized to lease the lands and tenements, "whereof he is hereby appointed receiver," and to pay the taxes, assessments and other lawful charges to which the premises should, from time to time, be subject.

January 19, 1877, by an order made in said action and in another brought to declare void the devise of the real estate

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of said McCunn and to partition the same, said O'Donohue was removed at his own request and the defendant was appointed receiver in his place and stead "to receive the rents and profits of the estate, freehold and leasehold * * * and to collect and get in the outstanding personal estate" of said McCunn, with directions to tenants to attorn, etc. The order further provided that the defendant, as such receiver, should "have and possess the same powers and be subject to the same duties and obligations" as were conferred or devolved upon his predecessor. The defendant, by his answer, denied that he became invested by said appointment with the title to the "real or leasehold estate," but he admitted that in May, 1879, he leased the premises in question to one Federlein, and also that he had "paid to the plaintiff the amount of the rent of the said premises to and including September 1, 1878."

No rent was paid after the date last named and on the 7th of November, 1879, summary proceedings were instituted to remove the defendant, as tenant, and said Federlein, as under-tenant, from the possession of the premises, based on an affidavit alleging, and a summons reciting, that the defendant entered into possession and sublet, and that the defendant, as tenant, and said Federlein, as under-tenant, had made default in the payment of the rent and, as such, held over and continued in possession. No answering affidavit was filed, but on the 12th of November, 1879, as the record of the District Court shows, the tenant and under-tenant appeared by separate attorneys and, by consent, judgment of dispossession was duly rendered "in favor of said landlord," and against the "said tenant and all other persons." A warrant was issued on the nineteenth and returned the same day by the marshal, with a certificate that he had put the landlord in full possession of the premises in question.

Samuel Jones for appellant. There is no privity of contract between the defendant and plaintiff. Unless, then, there is privity of estate, or some ground of estoppel, the plaintiff cannot recover. There can be no privity unless the

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title to the demised term passed to and was vested in the defendant. (*Journey v. Brackley*, 1 Hilt. 451, 452; *Welsh v. Schuyler*, 6 Daly, 412-414; *Foster v. Townsend*, 2 Abb. [N. C.] 29-44; 68 N. Y. 203-206; *City of Brooklyn v. Jordan*, 7 Abb. [N. C.] 23-27; *Fincke v. Funke*, 25 Hun, 616-618; *Morse v. Morse*, 85 N. Y. 53; *Tucker v. Tucker*, 5 id. 409.) Defendant is not estopped by the summary proceedings from denying that he is plaintiff's tenant. (*People v. Johnson*, 38 N. Y. 63; *Woodruff v. Jewett*, 115 id. 267; *W. U. T. Co. v. Jewett*, Id. 166; *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 id. 340; *People v. N. T. Co.*, 82 id. 283.)

Charles Edward Souther for respondent.

VANN, J. The defendant contends that he is not liable in this action because there was privity neither of contract nor estate between himself and the plaintiff. There was no privity of contract, but we think that the facts appearing in the foregoing statement conclusively show that the defendant was in possession of the premises in question and, presumptively, that he was in possession from March 3, 1877, when his bond as receiver was filed. If he did not then take possession, it was incumbent on him to show it. He admitted that he was appointed receiver February 28, 1877, that he subsequently qualified and that he paid "the amount of the rent * * * to and including September 1, 1878." This admission fairly involves the proposition that he paid the rent that fell due according to the terms of the lease from the time that he became receiver until the date named. Whether the defendant was appointed receiver of the real estate of which the testator died seized, or simply of the rents and profits thereof, is not here important, because he was appointed receiver of the personal estate and, according to the Revised Statutes, leases for years "go to the executors and administrators to be applied and distributed as part of the personal estate of the testator or intestate," and are required to be "included in the inventory thereof." (4 R. S. [8th ed.] p. 2556; *Pugsley v. Aikin*, 11 N. Y. 494.)

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We think that the title to the demised term passed to and was vested in the defendant as receiver, and that he is, therefore, liable for the rent accruing from September 1, 1878, to and including September 1, 1879. (*Woodruff v. Erie R. Co.*, 93 N. Y. 609; *Frank v. N. Y., L. E. & W. R. R. Co.*, 122 id. 197.)

Upon the trial a tax bill was received in evidence for the taxes of 1876, 1877 and 1878, confirmed, respectively, September 14, 1876, October 9, 1877, and October 11, 1878. It also included the Croton water rent for 1876 and 1877, and was receipted by the proper officer as having been paid January 30, 1880. Another tax bill, which included the taxes of 1879, confirmed October seventeenth of that year and the Croton water charges for 1878, was also read in evidence. Both were objected to as irrelevant and immaterial, but neither as incompetent. Upon the close of the evidence, the counsel for defendant, after his motion to dismiss the complaint had been denied, asked the court to direct the jury that their verdict must be limited to the rent from May 1, 1879, to November 1, 1879, and to the taxes of 1879, with lawful interest upon each. This motion was denied, and thereupon the court was asked to limit the verdict to the rent from March 1, 1879, to November 19, 1879, and to the taxes for 1879, besides interest. The court denied this motion also, and directed a verdict for the plaintiff "for the sum of \$858.57, being for taxes, \$395.49; interest thereon, \$123.55, together \$519.04; and for rent, \$250; interest thereon, \$89.53; together, \$339.53, to which direction counsel for the defendant duly excepted."

While we are asked to review none of these rulings, we have considered them in order to determine whether the defendant should be relieved from the payment of the taxes that accrued prior to his appointment as receiver. The objection to the tax bills was not to the competency of the evidence, but to its materiality, and, as all of one was material and a part of the other, the objection, as made, was properly overruled. If the defendant wished to exclude the taxes that became due before he was appointed receiver, his objection should have been more specific and addressed to that part of the first bill that embraced

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those items. The same criticism applies to the motions to limit the verdict, as neither time did he include all the rent that fell due, or the taxes that became payable, while he held the title to the lease and was in possession of the premises. The limitation applied for was too sweeping, and the application was properly denied for that reason.

The exception to the direction for a verdict was general and, if we have reasoned correctly thus far, was too broad, as it did not bring before the mind of the trial judge or of the opposing counsel the point that the amount included for taxes was too large, because it embraced items accruing prior to March 3, 1877. If the exception had been to so much of the direction as covered the old taxes, the point could have been understood and an opportunity would have been afforded for correction, if the court so desired, or the opposing counsel wished to consent to a modification. (*Sterrett v. Third Nat. Bank*, 122 N. Y. 659, 662.)

Where a portion of a charge excepted to is correct in part and no qualification is suggested, a general exception cannot be sustained. (*Adams v. Irving Nat. Bank*, 116 N. Y. 606; *Smedis v. B. & R. B. R. R. Co.*, 88 id. 13; *Donovan v. Vandemark*, 88 id. 668.)

So, as we think, after counsel have tried to limit a verdict about to be directed by insisting that it should be confined to rents accruing from March 1, 1879, and taxes for that year, when the plaintiff is entitled to recover rent from September 1, 1878, and taxes for 1878 and 1879, and the court, in directing a verdict, includes the taxes for 1876 and 1877, a general exception does not enable this court to decide that the taxes last named should not have been included. (*Tuers v. Tuers*, 100 N. Y. 196.)

It is unnecessary, therefore, for us to decide whether the defendant is liable as the successor of O'Donohue upon the theory that the receivership was continuous.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

MARY E. LUETCHFORD, Appellant, v. ELIZABETH LORD,
Impleaded, etc., Respondent.

In an action to foreclose a mortgage executed by defendants, who were husband and wife, upon lands of the latter to secure their joint bond, the wife, who alone answered, alleged that part of the consideration of the bond and mortgage was a gambling debt due the mortgagee from the husband, and that, at the time of the execution of the bond and mortgage, the persons who would have been entitled to the mortgaged premises were the defendant's four children. The mortgagee died prior to the bringing of the action. Upon the trial the wife called the husband as a witness to prove the averment as to the consideration of the bond and mortgage; this was objected to and the testimony excluded on the ground that the witness was incompetent under the Code of Civil Procedure (§ 829) to testify to conversations or transactions between him and the deceased mortgagee. *Held*, no error; that the provisions of the Revised Statutes (1 R. S. 663, §§ 16, 17), upon which the defense was based, which declare all things in action and securities, any part of the consideration for which is money won by playing at any game, to be "utterly void," except where the security affects real estate, when it shall be void as to the grantee, but shall inure to the sole benefit of the person entitled to the real estate in case the grantor or incumbrancer had died immediately upon the execution of the instrument, could not be construed as operative to transfer to the mortgagor's heirs title to the mortgage alone, leaving the bond valid in the hands of the obligee; that the mortgage being merely an incident of the debt, the necessary effect of the statute is that the bond goes with it to the mortgagor's heirs, not absolutely, but only so far as necessary to give validity to the mortgage, and in case the amount of the debt exceeded the value of the land mortgaged, to the extent of the excess, the bond, if the defense was sustained, would be utterly "void," and as judgment was sought against the witness for any deficiency, he was directly interested in the event of the action.

Luetchford v. Lord (57 Hun, 572), reversed.

(Argued March 21, 1892; decided April 26, 1892.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 23, 1890, which reversed a judgment in favor of plaintiff entered upon a decision of the Special Term and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Horace McGuire for appellant. The evidence of George D. Lord was incompetent and was properly excluded. (Code Civ. Pro. § 829; *Smith v. Hathorn*, 25 Hun, 159; *Weed v. Hornby*, 35 id. 580; *Geissmann v. Wolf*, 46 id. 289; *Church v. Howard*, 79 N. Y. 415; *Holcomb v. Holcomb*, 95 id. 316.) This is not a case where a severance of the action could be had under section 456 of the Code or ordered under section 1205. (*Cobb v. Thornton*, 8 How. Pr. 66; *McCarthy v. Graham*, 8 Paige, 480; *Bank of Rochester v. Emerson*, 10 id. 115; *Smith v. Hathorn*, 25 Hun, 159.)

William N. Cogswell for respondent. The exclusion of the testimony of Lord was error. (*Good v. Elliott*, 3 T. R. 693; 1 R. S. 663, chap. 20, art. 3, §§ 16, 17; *Connelly v. O'Connor*, 117 N. Y. 91.)

BROWN, J. The complaint in this action alleged the execution and delivery by the respondent and her husband, George D. Lord, to one William Allen, of a joint bond bearing date September 6, 1877, to secure the payment of the sum of fifty-five hundred dollars on January 1, 1890, with interest payable semi-annually, and as collateral security thereto a mortgage upon real estate situated in the county of Monroe.

It alleged the death of Allen and the assignment of said bond and mortgage to the plaintiff by the executors of his last will, and the failure upon the part of the defendants to pay the amount due thereon, and demanded the usual judgment of foreclosure and sale of the mortgaged property, and that the defendant be adjudged to pay any deficiency that should remain after applying to the payment of the debt all the proceeds of the sale applicable thereto. The real estate mortgaged was owned by Mrs. Lord, and she alone defended the action.

The answer alleged that a part of the consideration of the bond and mortgage was the securing to said Allen of a sum of money won by him from George D. Lord at a game of poker.

That at the time of the execution of said bond and mortgage, the persons who would have been entitled to the real

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estate described in the mortgage if said defendant had died, were her four children, who were named and all of whom were then living. It prayed that said bond and mortgage be declared void and canceled, or, if the court should decree that the same inured to the benefit of the respondent's said children, for such other relief as should be just.

This defense was based upon 1 R. S. (p. 663, §§ 16, 17), which, so far as material, are as follows: Sec. 16. "All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed by any person where the whole or any part of the consideration of the same shall be any money * * * won by playing at any game whatsoever * * * shall be utterly void, except when such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein so far only as hereinafter declared."

Sec. 17. "When any securities, mortgages or other conveyances executed for the whole or part of any consideration specified in the preceding section shall affect any real estate, they shall inure for the sole benefit of such person as would be entitled to the said real estate, if the grantor, or person encumbering them, had died immediately upon the execution of such instrument and shall be deemed to be taken and held to and for the use of the person who would be so entitled."

Upon the trial, after the plaintiff had given proof sufficient to entitle him to the judgment asked for, the respondent called as a witness her husband, George D. Lord, and proved by him that at the time of the execution of the bond and mortgage she had four children, and that they were all living at the time of the trial. The record then contains the following statement:

"The defendant thereupon offered to prove by the witness George D. Lord that a part of the consideration of the said bond and mortgage, and at least the sum of seven hundred and fifty dollars thereof, was for money won by said William Allen of said George D. Lord by playing at a game of chance called 'poker,' and at least the sum of seven hundred and fifty dollars of the said bond and mortgage was for the payment and

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security of said gambling debt, and no other or different. The plaintiff thereupon objected to the proving of such fact by the witness George D. Lord, on the ground that the said George D. Lord is incompetent to testify to any conversation or transaction between him and said William Allen, deceased, by the provision of section 829 of the Code of Civil Procedure. The objection was sustained by the court and the offer of the defendant excluded, to which ruling the defendant then and there duly excepted."

The exception to this ruling of the court presents the question to be decided upon this appeal. The Special Term gave judgment for the plaintiff which was reversed by the General Term.

The appellant contends that the witness was interested in the result of the action for the reason that her defeat upon the issue raised by the answer would have discharged the witness from all liability upon the bond, and, as the obligation was joint, this contention is sound unless it is overcome by the application to the facts of the case of the statute heretofore quoted.

The respondent's claim is two-fold. First. That the result of proving the facts pleaded in the answer, under the operation of the statute, would be to work a transfer of the bond and mortgage from the plaintiff to the children of Mrs. Lord, and that the liability of the witness upon the bond would be intact and could be enforced against him by the parties into whose possession the statute would transfer it, and that Mr. Lord was not interested in an event which determined nothing more than the ownership of the securities. Second. That the evidence was competent for the purpose of proving that the mortgage did not belong to the plaintiff, under the provision of the statute, irrespective as to who had title to the bond, and that, if the facts had been proven, the court might have adjudged that the complaint, so far as it sought a foreclosure of the mortgage, should be dismissed, and either given judgment for the plaintiff upon the bond, or made the dismissal without prejudice to bring another action upon the bond.

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This latter ground was not taken at the trial as will appear from the offer which I have quoted. The attention of the court was not called to the fact that the evidence was claimed to be admissible only to affect the demand for a foreclosure of the mortgage. The offer was general to prove illegality in the consideration of both bond and mortgage. That it was inadmissible as to the bond is apparent, and, so far, the ruling of the court was right, and I am inclined to think the appellant cannot now claim a limited application of the evidence as a ground of error.

But, regarding the form of the offer as of no consequence, our opinion is that the statute cannot have such a construction as to make it operative to transfer to the mortgagor's heirs title to the mortgage alone.

The statute against betting and gaming was enacted as a protection of the public morals. The intention of the legislature was to discourage and repress gambling in all its forms, and the law under consideration, having been enacted for the public good, is to be construed so as to accomplish, so far as possible, the suppression of the mischief against which it was directed. (*Ruckman v. Pitcher*, 1 N. Y. 396; *Storey v. Brennan*, 15 id. 527.)

The intention is that the offender against the laws prohibiting gambling is to be punished by being deprived of any real estate mortgaged or conveyed to secure the gambling debt, and that real estate so mortgaged or conveyed shall pass to the heirs of the offender. The statute saves the security or conveyance for the single purpose of preserving the real estate to the heirs of the mortgagor or grantor. As to a mortgagee, both bond and mortgage are void, but the mortgage is preserved as a medium to transfer the land to the mortgagor's heirs.

But such a result could be accomplished only through a foreclosure of the mortgage, and it needs no argument to show that the purpose of the statute would be defeated if the mortgage should belong to one person and the bond to another.

The learned counsel for the respondent takes two positions

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which are absolutely inconsistent. He argues, first, that the bond and mortgage are to be regarded as a single security affecting real estate and both pass under the statute and can be enforced by the mortgagor's heirs. That the witness was not pecuniarily interested in that result, as his liability to pay the debt was not thereby affected. Hence the evidence was admissible. His second proposition is that the mortgage alone affects the land, and that the court could have severed the securities and dismissed the complaint so far as it sought a sale of the real estate. That under this construction the evidence was admissible as it did not affect the liability of the witness on the bond. The argument presented by the learned counsel in the first point is a complete answer to his second proposition. I quote from his brief. "The statute expressly states that the securities where they affect real estate, shall immediately upon the execution thereof, be taken and held for the use of Mrs. Lord's children. In other words, the fact that a part of the consideration was for a gambling debt, works a transfer and assignment of the mortgage. I submit that that being so, to carry out the intent and purpose of the statute effectively it must be held that the bond, which is a part of the same transaction, comes within the saving grace of the statute and inures for the benefit of the children of Mrs. Lord alike with the mortgage. If that is not so then the statute is meaningless and the object sought to be accomplished by the statute utterly fails. It cannot be claimed that in such a case as this the statute contemplated that the mortgage should belong to one person and the bond to another. The beneficial interest in the debt is, however, included in the assignment of the mortgage, although the terms of the assignment embraces the mortgage alone. This would be the presumed intention of the parties in all cases when the debt has not been already transferred to another. The mortgage being merely an incident of the debt cannot be assigned separately from it so as to give any beneficial interest. (Jones on Mortgages, § 805.) If then the intent of the statute was to confer the beneficial interest in the mortgage to the children of Mrs. Lord, as to

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which there is no question, the necessary effect must be that the bond, the evidence of the debt, must go with it."

We concur in this reasoning, but we do not adopt the counsel's conclusion that the bond absolutely passes to the mortgagor's heirs, and such construction is not necessary to carry out the purposes of the statute. The bond is not of itself a security affecting real estate, and only so far as it is essential to give validity to the mortgage in the hands of the mortgagor's heirs, is it necessary to hold that it comes under the operation of the statute.

If the amount of the debt is less than the value of the real estate the bond to the whole amount would necessarily pass because the heirs would acquire such an interest in the real estate only as is equal to the amount of the debt attempted to be secured, and the practical operation of the statute in such case would lead simply to the foreclosure of the mortgage, a sale of the land and payment of the amount secured. But it would be otherwise in case the amount of the debt exceeded the value of the land. In such case the heirs acquiring no right to the bond, except so far as it was necessary to support the mortgage, it to the extent of any excess over the value of the land would, under the statute, be "utterly void" and would be extinguished.

It follows that the result of proving the facts set out in the answer and which it was proposed to prove by the witness George Lord would be to confine the enforcement of the bond and mortgage to the land and destroy the personal liability of the obligors upon the bond, and as the only judgment sought against the witness was for any deficiency that might exist after a sale of the land, he was directly interested in the event of the action and incompetent to testify to any transaction with the deceased mortgagee, and his evidence was properly excluded.

The order of the General Term should be reversed and the judgment of the Special Term affirmed.

All concur, except BRADLEY, J., not voting.

Order reversed and judgment affirmed.

Statement of case.

ABRAHAM ROTHSCCHILD, Respondent, v. CLARENCE WHITMAN et al., Appellants.

Plaintiff's complaint alleged in substance that defendants, without probable cause, "wrongfully, unlawfully and maliciously begun an action" against plaintiff and caused him to be arrested and imprisoned under an order of arrest issued therein; that the order of arrest was vacated and plaintiff was discharged on the ground that it "was illegal, unauthorized, and that the court had no jurisdiction to grant the same." Two of the defendants set up as a counter-claim that plaintiff, as the manager of a certain firm, by fraud, deceit and false representations, induced defendants to sell it goods on credit, knowing that the firm would and could not pay; that after the receipt of said goods, the firm and plaintiff, with intent to cheat and defraud and in pursuance of their intent not to pay, secretly disposed of said goods; that the matters so alleged constituted one of the causes of action for which the arrest complained of was made, and that the order of arrest was vacated, not on the ground that said allegations were untrue, but because of the misjoinder of causes of action and parties. *Held*, that a demurrer to the answer was properly sustained; that it did not, within the meaning of the Code of Civil Procedure (§ 501), set forth facts constituting a cause of action arising out of the transaction set forth in the complaint; nor was it connected with the subject of the action, whether it was to be considered as an action for false imprisonment or malicious prosecution; that the complaint and answer set forth distinct and independent torts, with no necessary or legal connection between them.

Reported below, 57 Hun, 135.

(Submitted March 22, 1892; decided April 26, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 6, 1890, which reversed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term and sustained a demurrer to a counter-claim pleaded by three of the defendants.

The plaintiff alleged in his complaint that, on the 1st of September, 1887, the defendants, "not having any just or probable cause of action against the plaintiff, did * * * wrongfully, unlawfully and maliciously begin an action against" him, and "did cause to be issued out of the Supreme Court

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* * * a certain alleged order of arrest" therein, and did cause him to be arrested thereunder and kept in custody for about a week, so that he was compelled to abandon his business and expend a large sum of money "in and about said arrest." He further alleged that afterwards, on his motion, the order of arrest was duly vacated "upon the ground that the same was illegal, unauthorized and that the court had not jurisdiction to grant the same, * * * and defendant discharged thereunder, and that said proceeding has been wholly and finally terminated in favor of the plaintiff and against the said defendants by final order of the said court."

The defendants Whitman and Creighton, after pleading certain defenses, alleged "for a further defense and by way of counter-claim," that the plaintiff, as the manager of a certain firm, induced them to sell its goods worth \$2,790.23, on credit, knowing and intending that said firm "would not and could not" pay for the same, and that he effected said sale by fraud, deceit and false representations as to the financial standing of said firm; that after the receipt of said goods and others of great value obtained in the same way from other persons, the plaintiff and said firm, "with intent to cheat and defraud their creditors, and in execution of their intention not to pay for" the same, secretly shipped them away and concealed, sold and otherwise disposed of the bulk thereof; that the plaintiff used the proceeds of the goods so obtained and disposed of to reopen one of the stores formerly occupied by said firm, and to conduct therein, under another name, a business of the same character that he had lately conducted as manager; that the defendants had no knowledge of the falsity of said representations, but relied upon the same and were deceived thereby to their damage in the sum of \$2,790.23; "that the matters hereinbefore alleged constitute part of the grounds and one of the causes of action for which the arrest of the plaintiff, complained of in this action, was made, and the vacating of said arrest was not on the ground that said allegations were untrue, but because of a misjoinder of causes of action and parties."

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By a separate answer the same facts were pleaded "by way of mitigation and defense."

The plaintiff demurred "to the alleged counter-claim," on the ground that "it does not constitute a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor is it connected with the subject of the action."

The Special Term, in overruling the demurrer, held that if the complaint was for malicious prosecution, the counter-claim was properly pleaded; that if it was for false imprisonment, the counter-claim was not properly pleaded; that as the complaint was susceptible of either construction, the meaning least favorable to the pleader should be taken and that the plaintiff by alleging malice and want of probable cause was estopped from saying that there was no connection between the counter-claim and the subject of the action.

The General Term reversed upon the ground that the counter-claim was not connected with the subject of the action in any legal sense, and that it did not arise out of the same transaction.

John S. Davenport for appellants. The counter-claim cause of action is "connected" with the subject of this action within the meaning of section 501 of the Code. (*Carpenter v. M. L. I. Co.*, 93 N. Y. 552; *G. & H. M. Co. v. Hall*, 61 id. 226.) The plaintiff must prove affirmatively want of probable cause and malice. (*Anderson v. Howe*, 116 N. Y. 336.) This action is clearly for malicious prosecution. (*Marx v. Townsend*, 97 N. Y. 590-601.) If the complaint is susceptible of two meanings, plaintiff must accept our election of that which is most unfavorable to his demurrer. (*Clark v. Dillon*, 97 N. Y. 370.)

Otto Horwitz for respondent. A counter-claim must be connected with the subject of the action, or arise out of the transaction set forth as the foundation of the plaintiff's claim. (*Grange v. Gilbert*, 44 Hun, 9; *People v. Dennison*, 84 N.

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Y. 272; *Edgerton v. Page*, 20 id. 281, 285; *Chamboret v. Cagney*, 10 Abb. Pr. [N. S.] 311; *Henry v. Henry*, 17 Abb. Pr. 411; *Schnaderbeck v. Worth*, 8 id. 37.) A cause of action in tort cannot be set up as a counter-claim in another action in tort. (*Campton v. Elliott*, 16 J. & S. 211; *Askins v. Hearn*, 3 Abb. Pr. 184.) A demurrer admits only facts well pleaded, and not legal conclusions or inferences. (*Masterson v. Townshend*, 123 N. Y. 461; *Bogardus v. N. Y. L. Ins. Co.*, 101 id. 337; *Bonnell v. Griswold*, 68 id. 294.)

VANN, J. A counter-claim must tend in some way to defeat or diminish the plaintiff's recovery, and must be either (1) a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, or (2) in an action on contract, any other cause of action on contract existing at the commencement of the action. (Code Civ. Pro. § 501.) The counter-claim in question is a cause of action tending to diminish the plaintiff's recovery, and to that extent, conforms to the requirements of the statute. As this is not an action on contract, before we can determine that the counter-claim should stand as a pleading, we must ascertain whether it arose out of the transaction set forth in the complaint, and if it did not, whether it is connected with the subject of the action within the meaning of the Code. What is the transaction set forth in the complaint as the foundation of the plaintiff's claim? It is the commencement of an action against him, with malice and without probable cause, and his arrest therein under process that was afterwards set aside as illegal. What is the counter-claim? A cause of action for damages caused by deceit in the purchase of goods on credit. The deceit was practiced and the goods obtained in January, 1887, while the action was commenced and the arrest made in the following September.

While the deceit was the inducement to the action and arrest, it arose out of neither, because it preceded both and existed independently of both. Although it was the alleged

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ground of the action and arrest, it was not the cause of either, but was rather the pretext or ostensible reason. A groundless and malicious prosecution is caused by the act of commencing the action, not by the reasons given for commencing it. An illegal arrest, such as that in question, is caused by the issuing and service of the order of arrest, not by the facts recited therein. There is no relation of cause and effect between an illegal act, or the determination to do one, and the excuse alleged for doing it. We think that the claim and counter-claim did not arise out of the same transaction, and that the plaintiff's claim rests upon an entirely different foundation from the defendants' counter-claim. Each was a separate and distinct wrong and a transaction by itself.

The question remains whether the counter-claim was connected with the subject of the action, or in other words, with the facts constituting the plaintiff's cause of action. (*Cham-boret v. Cagney*, 2 Sweeney, 378; *Lehmair v. Griswold*, 8 J. & S. 100.)

The complaint and answer set forth independent torts, differing radically in nature and committed upon occasions widely separated. Whether the subject of the action is malicious prosecution, or false imprisonment, it is distinct and independent of the claim of the defendants. There is no necessary or legal connection between the two. It is not like an action for converting wood and a counter-claim for waste in cutting the same wood (*Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552), or where certain goods are the subject of the action and a claim is made for the value of the same goods (*Thompson v. Kessel*, 30 N. Y. 383), or where a mutual claim is made to a trade-mark (*Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226).

On the contrary the effort is here made to set up one tort committed in January against another committed in September, the one being for an injury to property and the other for an injury to the person. The circumstance that the deceit which constituted the former was the pretext or excuse for perpetrating the latter, establishes no such connection as to satisfy the statute, any more than if A. slanders B. on the

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Fourth of July and B. thrashes him for it at Christmas. (*Schnaderbeck v. Worth*, 8 Abb. Pr. 37; *Fellerman v. Dolan*, 7 id. 395; *Askins v. Hearn*, 3 id. 184, 187.)

The judgment should be affirmed, with costs, with leave to the defendants to amend their answer within twenty days, upon the payment of costs.

All concur.

Judgment affirmed. _____

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8149	158

CHARLES S. HINE, Respondent, v. THE MANHATTAN RAILWAY COMPANY et al., Appellants.

In an action by an abutting owner to restrain the operation of defendants' elevated railroad, in a street in front of plaintiff's premises, for the purpose of showing the permanent or fee damages, plaintiff was permitted to testify that certain offers had been made to him for the premises before the construction of the railroad. *Held*, error; that the testimony was simply the declarations or opinions of others as to value; also, that for such a purpose offers might not be proved even by the parties making them.

Harrison v. Glover (72 N. Y. 451), distinguished.

Hine v. M. R. Co. (26 J. & S. 877), reversed.

(Argued March 22, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 3, 1890, which affirmed a judgment in favor of plaintiff, entered upon decision of the court on trial at an equity term.

This action was brought to recover damages to plaintiff's premises in the city of New York caused by the building and maintenance of defendants' road, and for an injunction restraining its further operation.

The judgment awards to the plaintiff the sum of \$8,824.92 damages, and contains an injunction restraining the defendants from the further maintenance and operation of their elevated railway in front of plaintiff's premises, No. 13 Bowery, unless within the time fixed by the judgment they pay to the plaintiff the sum of \$12,500.

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The question discussed on this appeal relates to the admission in evidence of statements on the part of the plaintiff that he had been offered certain prices, which he named, for his property before the construction of the elevated railroad.

The following questions, among others, were asked by the plaintiff's counsel:

"Q. Before the elevated railroad was built, did you have any offers of parties who sought to buy the premises of you, and if so, what did they offer you for the property? [Counsel for the defendants objected to the questions as immaterial, incompetent and irrelevant; also, as not within the issue in this action. The court overruled the objection, and counsel for the defendants duly excepted.] A. In 1871 or 1872, I do not recollect which, I was offered a *bona fide* cash offer of \$60,000 for the property. I was then getting \$5,700 a year rent for it. I was after that frequently offered \$55,000; then I was getting \$5,400 a year rent for it. I refused the offer. * * * Q. You understood that offer for this property to be a *bona fide* offer? [The same objection, ruling and exception.] A. I understood it to be a *bona fide* offer."

Brainard Tolles for appellants. It was error to admit Mr. Hine's statement of what he was offered for the property before the railroad was built. (*Lawrence v. M. E. R. Co.*, 15 Daly, 502; *Teale v. M. E. R. Co.*, 61 Hun, 613; *Young v. Atwood*, 5 id. 234; *Whitney v. Thacher*, 117 Mass. 523; *Dickenson v. Fitchburg*, 13 Gray, 516, 554; *Drury v. M. R. Co.*, 127 Mass. 571; *Currie v. W., etc., R. Co.*, 52 N. J. L. 381; *Watson v. M., etc., R. Co.*, 75 Wis. 332; *L., etc., R. Co. v. Ryan*, 64 Miss. 399; *S. J., etc., R. Co. v. Orr*, 8 Kan. 419; *Battin v. Healy*, 36 How. Pr. 346; *Craw v. Becker*, 5 Robt. 262.) The circumstance that there is enough other testimony in the case to sustain the judgment does not authorize an affirmance. (*Foote v. Beecher*, 78 N. Y. 155; *Holcomb v. Holcomb*, 95 id. 315, 329; *Hubbell v. Schreyer*, 4 Daly, 362, 382; *Schoonmaker v. Wolford*, 20 Hun, 166; *Church v. Kidd*, 3 id. 254; *Varnum v. Hart*, 14 N. Y. S. R. 140, 147; *Doty*

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v. *Stanton*, 18 id. 427; *Rogers v. Wheeler*, 6 Lans. 420.) The court was bound to determine the value of the easement justly and truly and upon legal evidence. (*Doyle v. M. E. R. Co.*, 128 N. Y. 488; *Gray v. M. R. Co.*, Id. 499; *A. B. N. Co. v. N. Y. E. R. Co.*, 41 N. Y. S. R. 531; *Bohm v. M. E. R. Co.*, 42 id. 247; *Somers v. M. E. R. Co.*, Id. 247; *Odell v. N. Y. E. R. Co.*, Id. 592.) It was error to permit the witness, Schwartz, to give his opinion as to the landlord's reason for reducing the rent. (*Riley v. Mayor, etc.*, 96 N. Y. 331.)

William H. Arnoux and *John R. MacArther* for respondent. Within the discretion of the judge, evidence of unaccepted *bona fide* offers for the purchase or sale of property is admissible and competent evidence of the market value of such property. (*Keller v. Paine*, 34 Hun, 167; *Harrison v. Glover*, 72 N. Y. 451; *B. M. Ins. Co. v. Slocovitch*, 23 J. & S. 456; *Dalrymple v. Hanneron*, 54 N. Y. 654; *Thurber v. Thompson*, 21 Hun, 472; *Durst v. Burton*, 47 N. Y. 167.) If the law were otherwise, and offers for the purchase of property are inadmissible as evidence of value, the ruling of the court below in admitting such evidence was not prejudicial to defendant, and, therefore, the judgment recovered will not be disturbed. (*McGean v. M. R. Co.*, 117 N. Y. 219; *Forrest v. Forrest*, 25 id. 510; *People v. Gonzales*, 35 id. 59; *Tenney v. Berger*, 93 id. 524; *Stephens on Ev.* 245.)

PARKER, J. The relief sought by plaintiff rendered it important that he should show the market value of the premises in controversy, prior to the building of defendants' railroad.

Part of the evidence introduced for that purpose consisted of his own testimony, to the effect that he had received certain offers for the property.

We agree with the General Term that the court erred in receiving it.

It must be borne in mind that we are not considering the admissibility of an offer made in an open market, such as the Produce Exchange, for an article of recognized uniform char-

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acter, constantly bought and sold in the market, and having a place in the daily reports of prices current, such as number one wheat, or corn; but that of an unaccepted offer for a piece of real estate, having a market value it is true, but one not generally known in the market or to the public. Such market value may be shown by the testimony of competent witnesses but not by an offer.

In the first place, the evidence adduced in this case is objectionable, because it places before the court or jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination.

The highest value at which an offer, standing alone, can be estimated is, that it represents the opinion of him who makes it as to the worth of the property. Nevertheless, the assertion that he offered to part with his money, might give to such hearsay opinion more weight with a jury, than an opinion given by a witness before them, not thus supported. While, notwithstanding, his opinion was backed by a promise to pay money, which was not enforceable, he may not have been competent in a legal sense to express an opinion on the subject. If he was, other reasons may have prompted the offer than an expectation of actually becoming the purchaser; or of obtaining it at its market value.

But we pass to the objection that in such a case as we have under consideration, offers may not be proven even by the party making them.

The General Term of the fourth department, had the question before it in *Keller v. Paine* (34 Hun, 167-177). And in discussing the question the court said:

"It has been intimated in some cases that offers are some evidence of value. But it is a class of evidence which it is much safer to reject than to receive. Its value depends upon too many circumstances. If evidence of offers is to be received it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and

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whether made with reference to the market value of the article, or to supply a particular need or to gratify a fancy. Private offers can be multiplied to any extent for the purpose of a cause, and the bad faith in which they were made would be difficult to prove."

The reasons thus assigned in support of the decision made we fully approve.

That decision has been followed in *Leale v. Met. El. R. R. Co.* (61 Hun, 613); *Lawrence v. Met. El. R. R. Co.* (15 Daly, 502).

The proposition has been asserted in *Ross v. Met. El. R. Co.* (29 St. Rep. 517); *Keeh v. Met. El. R. Co.* (31 id. 406).

It has also been applied to offers relating to personal property. (*Young v. Atwood*, 5 Hun, 234; *Linde v. Republic F. Ins. Co.*, 18 J. & S. 362; *Weld v. Reilly*, 16 id. 531.) It is so held in other jurisdictions. (*Fowler v. Co. Com. of Middlesex*, 6 Allen, 92-96; *Whitney v. Thacher*, 117 Mass. 523-527; *Wood v. Firemens' Ins. Co.*, 126 id. 316-319; *Louisville, N. O. & Texas R. R. Co. v. Ryan*, 64 Miss. 399-404; *St. Joseph & Denver R. R. Co. v. Orr*, 8 Kansas, 419-424.)

In the few cases which may be found holding the other way the question does not seem to have received much consideration from the courts rendering the decisions, and the absence of argument in their support renders unnecessary any special reference to them.

Respondent's counsel insists that *Harrison v. Glover* (72 N. Y. 451) is an authority against the position here approved, but we do not so read it. There the plaintiff employed the defendants to sell blankets at a price not less than the manufacturing corporation of D. & Co. marketed blankets of their manufacture.

The question was, what did the parties intend by this contract? Did they intend to make the actual sales by D. & Co. of their blankets the test or the price at which they held them?

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Judge ANDREWS said: "It was competent for the parties to provide that the price of D. & Co.'s blankets, as ascertained by the actual sales only, should govern the price of the plaintiff's blankets. But the parties did not understand this to be the meaning of the contract," and this statement is followed by an argument on the part of the learned judge to show that the contract which the parties intended to make, and did, was that the defendant should be governed by sales, or by ascertained *bona fide* offers to sell.

The discussion had reference solely to the test which the parties had established by their contract, and was not intended to and does not affect the question before us.

While we agree with the General Term in the view expressed touching the question so far considered, we cannot indorse the position taken that a reversal should not be had because such testimony did not affect the result. We do not well see how this court can ascertain or determine what weight it had. The question of value was sharply contested, and if we cannot say that this testimony did not influence the decision of the court the appellant is entitled to have its admission declared to constitute reversible error.

The presumption necessarily arises from the situation presented by the evidence and the decision of the court, that the evidence was considered, and it is strengthened by the fact that the trial court after passing on the admissibility of the testimony and listening to the answer of the witness, asked the plaintiff how long before the building of the road the offer of \$55,000 was made.

The judgment should be reversed.

All concur.

Judgment reversed.

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SUSAN JEFFERSON et al., Respondents, v. THE NEW YORK
ELEVATED RAILROAD COMPANY et al., Appellants.

Where in an action by an abutting owner against an elevated railroad company to restrain the operation of its road in a street, the question of fee damages is gone into for the purpose of determining the sum to be paid by defendant for a conveyance of plaintiff's rights in the street of which he has been deprived, the opinions of witnesses as to what plaintiff's premises would have been worth if they were unaffected by the road and its operation, is incompetent.

To questions calling for such testimony defendant objected, "as incompetent * * * and conjectural, * * * and not within the competency of any witness." *Held*, that the objections were sufficient to present the question.

(Argued March 24, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of May, 1890, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This was an action to restrain the defendants from maintaining and operating an elevated railway in front of premises belonging to the plaintiffs known as No. 934 Ninth avenue; to recover the damages already sustained by reason of the construction and operation of said railway and, in case the defendants are permitted to continue to operate the same, to compel them to pay permanent damages sustained by the plaintiffs in consequence thereof.

The judgment, as entered, awarded the sum of \$2,000 for damages already sustained, with a permanent injunction against the further operation of the railroad, provided the defendants should not within a specified time tender to the plaintiffs for execution a conveyance of the "easements" found to have been taken, and upon the execution and delivery of the same, pay them the sum of \$4,000, besides interest.

The facts, so far as material to the questions discussed, are stated in the opinion.

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Samuel Blythe Rogers for appellants. It was error to refuse to find that the premises in question had been benefited by the railroad and the station at Fifty-ninth street. (*Kennedy v. Porter*, 109 N. Y. 526, 534; *Bohm v. M. E. R. Co.*, 42 N. Y. S. R. 247; *In re Pacher*, 140 U. S. 360, 370; *McGean v. M. R. Co.*, 117 N. Y. 219; *Starbird v. Barrows*, 43 id. 200; *Flynn v. Taylor*, 127 id. 600.) It was error to admit the opinions of witnesses as to what the fee and rental values of the premises in question would have been without the elevated railroad. (*Roberts v. N. Y. E. R. R. Co.*, 128 N. Y. 455; *Doyle v. M. E. R. Co.*, Id. 488; *Gray v. M. R. Co.*, Id. 499; *Kernochan v. N. Y. E. R. Co.*, 41 N. Y. S. R. 266; *Messenger v. M. E. R. Co.*, Id. 949; *A. B. N. Co. v. N. Y. E. R. R. Co.*, 129 N. Y. 252.) It was error to award in this action, as incidental to the equitable relief, damages not sustained by plaintiffs themselves, but assigned to them by former owners of the property. (*Sohmer v. M. E. R. Co.*, 60 Hun, 148; *Lynch v. M. E. R. Co.*, 41 N. Y. S. R. 541; *Shepard v. M. R. Co.*, 131 N. Y. 215.)

Charles Gibson Bennett for respondents. The admission in evidence of the opinions of witnesses as to what the fee and rental value of the premises would be if there were no elevated railroad maintained and operated in front of them, was not error. (*Cravford v. M. R. Co.*, 120 N. Y. 624; *Valentine v. Richardt*, 126 id. 272; *Moore v. E. R. R. Co.*, Id. 671; *Houghton v. Jones*, 1 Wall. 702; 13 Barb. 169; 17 Wend. 649.) The refusal of the court to find as a fact that the maintenance and operation of the railway had been a benefit to the plaintiffs' premises was abundantly justified by the evidence, and so was not legal error. (*S. O. Co. Case*, 64 N. Y. 91; *Thompson v. Bank of B. N. A.*, 82 id. 1-7; *Williams v. B. E. R. Co.*, 126 id. 96; *Wiltsie v. Eddie*, 4 Trans. App. 481; *Glacius v. Black*, 50 N. Y. 145-147; *Dolan v. Merritt*, 18 Hun, 28; *Mulford v. Yager*, 7 N. Y. Supp. 88; *Van Slyke v. Hyatt*, 46 N. Y. 263; *Hill v. Grant*, Id. 496; *Hurlburt v. Hurlburt*, 128 id. 420.) The court did not err in awarding damages for

the period from April 13, 1883, to October 17, 1885, during which the premises were owned by the plaintiffs in common with two brothers, whose claim they have by assignment. (*Haggart v. Morgan*, 5 N. Y. 422-427; *Groat v. Gile*, 51 id. 431; *Mackellar v. Rogers*, 109 id. 468.)

VANN, J. Upon the trial of this action one Cody was called as a witness for the plaintiffs and after testifying to his qualifications as an expert in estimating the value of real estate and stating his judgment as to the rental value of the premises in question just before certain alterations had been made therein, he was asked the following questions: "What in your judgment would have been the fair rental value of those premises if they had not been affected by the construction and operation of the elevated road? What in your judgment would be the fair selling fee value of those same premises if they were not affected by this road and its operation? What would the fair rental value be if they were unaffected by this road and its operation?" To each of these questions the defendants objected "as incompetent, irrelevant, immaterial and conjectural; as not within the competency of this witness, and not within the competency of any witness; and as including all the damages due to the railroad and not all the damages due to the taking of the plaintiffs' easement." The objections were overruled and the defendants excepted. To the first question the witness answered: "It would be worth four or five dollars a month more." He then added that in his judgment the present fee value of the premises, situated as they are, with the road in operation, is about \$40,000.

In answer to the second question, he said: "\$45,000. In my judgment the fair rental value of those premises, as they are now, to-day, is, the store and basement, about \$1,200 a year; the next floor, about \$600 a year; the third floor, about \$700; the fourth floor, \$650 and the top floor, \$600." His answer to the third question was as follows: "The store and basement would be worth \$1,500 a year; the next floor would be worth \$700 a year; the next floor, \$800 a year and the fourth floor,

\$720, \$60 a month ; the top floor would be worth as much as \$720."

Another expert witness for the plaintiffs was asked for his judgment as to the fee value of the premises if they were not affected by the railway and its operation, and subject to the same objection, he said from forty-seven to forty-eight thousand dollars. When asked as to the rental value, if the premises were unaffected by the railway and its operation, he answered, subject to the same objection, that it would bring at least seven or eight hundred dollars more.

In actions brought by abutting owners to restrain these defendants from operating or maintaining their elevated railroad, it has been held by this court that the opinion of an expert as to what would have been the value of the property affected, if the railroad had not been built, is incompetent. (*Roberts Case*, 128 N. Y. 455 ; *Doyle Case*, Id. 488 ; *Gray Case*, Id. 499, 508 ; *Kernochan Case*, 130 id. 651 ; *S. C.*, 41 N. Y. S. R. 266.)

In this case, professed experts were allowed to state what the plaintiffs' premises would be worth, if they were not affected by the road and its operation, which is equivalent to stating the value of the property if the road had not been built. The questions differ in form only, not in substance, from those recently adjudged incompetent. The questions and answers bring the same ideas before the mind in this case, except as to amounts, as in the cases cited.

We think that the opinions of witnesses as to what the premises in question would have been worth, if they were unaffected by the road and its operation, were incompetent under the rule established by this court in relation to the subject.

The learned counsel for the plaintiffs criticises the objections made by the defendants to this evidence as insufficient, because they do not suggest that the subject to which the questions relate is not one upon which expert evidence is admissible. Reference is made to the *McGean Case* (117 N. Y. 219), where the objection was based, in part, upon the ground that

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the witness was not competent to give an opinion and the court suggested that this might imply that opinions were competent on the subject. In this case, however, no such implication can arise, because the point was distinctly made in the objection that the question was "not within the competency of this witness and not within the competency of any witness," just as in the *Doyle Case* (*supra*), it was objected that "the question was not within the competency of this expert, or any expert." In both cases the question called for an opinion only and the objection challenged the competency of any witness to give an opinion upon the subject to which the question related. In the *Roberts Case* (*supra*), the corresponding question was objected to as hypothetical and incompetent, and in the *Doyle Case* (*supra*), as hypothetical, speculative and incompetent.

In the *Gray Case* (*supra*, p. 508), a somewhat similar question was objected to "as not within the issue; as hypothetical and conjectural * * * and as incompetent, irrelevant and immaterial." In the case now before us, the questions were objected to on similar grounds, and to quite an extent on grounds identical with those in the authorities cited, and we think that the objections were sufficient to raise the point that was decided in those cases and to make them binding upon us in the decision of this. Conjecture and speculation are used in two of those cases as synonymous terms. (*Roberts Case*, p. 474; *Gray Case*, p. 509.)

It is further insisted that there was enough evidence, other than that objected to, to support the judgment, and hence that the defendants have not been harmed.

Even if the testimony that was not objected to was sufficient to justify the result reached by the learned trial judge, it certainly would not compel it. There was evidence that would have justified a result more favorable to the defendants. As was said by the court in *Foot v. Beecher* (78 N. Y. 155, 158), "an error in receiving incompetent evidence, if properly excepted to, can only be disregarded when it can be seen that it did no harm. If the evidence is slight or irrelevant, or if without it the fact is conclusively established by other evi-

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dence, it may disregarded, because it could not have injured the other party."

Even if the result would probably have been the same without the objectionable evidence as with it, as there was testimony that would have warranted a different conclusion, we cannot say what weight the opinions, erroneously received, may have had. (*Starbird v. Barrons*, 43 N. Y. 200.)

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

132	488
148	84
182	488
162	288

CORNELIA GILMAN, Appellant, v. AUGUSTUS PRENTICE et al.,
Respondents.

Where, upon the trial of an action before a referee, motions by defendant for a dismissal of the complaint were made before the taking of any evidence and after plaintiff rested, which were not passed upon by the referee, he reserving his decision, and thereafter evidence was introduced by defendant, and the case submitted to the referee without a renewal of the motions or calling for a decision thereon, and subsequently the referee made his report, dismissing the complaint without any findings of fact, or requests to make any such findings, *held*, that the judgment was not reviewable here, because of the absence of findings required by the Code of Civil Procedure (§ 1022).

(Argued March 25, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 3, 1889, which affirmed a judgment in favor of defendants entered on the report of a referee.

This action was brought to set aside a judgment.

The facts, so far as material, are stated in the opinion.

Charles E. Hughes for appellant. The plaintiff is entitled to have the judgment entered against her upon an unauthorized appearance by an irresponsible attorney, together with all proceedings pursuant to said judgment, including the execution sale, the redemption and the sheriff's deed, absolutely set

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aside. (*Ferguson v. Crawford*, 70 N. Y. 256; *Brown v. Nichols*, 42 id. 26; *Vilas v. P. & M. R. R. Co.*, 123 id. 455, 456; *Kerr v. Kerr*, 41 id. 278; *Harshey v. Blackmarr*, 20 Iowa, 161.) A judgment based solely upon the unauthorized appearance of an irresponsible attorney will be absolutely set aside, upon a direct application. (*Harshey v. Blackmarr*, 20 Iowa, 161; *Denton v. Noyes*, 6 Johns. 296; *Campbell v. Bristol*, 19 Wend. 101; *Adams v. Gilbert*, 9 id. 499; *Allen v. Stone*, 10 Barb. 547; *Williams v. Van Valkenburg*, 16 How. Pr. 147; *Meacham v. Dudley*, 6 Wend. 515; *People v. Mayor*, 11 Abb. Pr. 71, 72; *Acker v. Ledyard*, 8 N. Y. 65; *Bogardus v. Livingston*, 7 Abb. Pr. 429; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 453.) To obtain this relief it is not necessary for Mrs. Gilman to show that she had a defense on the merits to the action brought by Prentice. (*Vilas v. P. & M. R. R. Co.*, 123 N. Y. 454.) There is nothing in the situation of the defendants which requires a denial of this relief to the plaintiff. (Code Civ. Pro. §§ 1468, 1479; *Nordlinger v. De Mier*, 54 Hun, 276.) Under the special circumstances disclosed in the present case, the plaintiff is entitled to relief in equity. (*Ferguson v. Crawford*, 70 N. Y. 267; *Harshey v. Blackmarr*, 20 Iowa, 161; *Shelton v. Tiffin*, 6 How. [U. S.] 163; *Ridge v. Alter*, 14 La. Ann. 866; *Marvel v. Manourrier*, Id. 3; *Ormsley v. Jacques*, 12 Hun, 443; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 441; *Denton v. Noyes*, 6 Johns. 297; *Brown v. Betts*, 13 Wend. 29; Code Civ. Pro. § 1479.) The action was well brought in the Superior Court of the city of New York. (*Popfinger v. Yutts*, 102 N. Y. 38.) The complaint states facts sufficient to constitute a cause of action. (*Bishop v. E. T. Co.*, 5 J. & S. 12.) If there was a misjoinder of causes of action it appeared on the face of the complaint and as the point was not raised by demurrer, the objection was waived. (Code Civ. Pro. §§ 498, 499; *Blossom v. Barrett*, 37 N. Y. 436.)

Charles J. Hardy for respondents. The court has no jurisdiction to entertain the cause of action set forth in the com-

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plaint. (*Smith v. Nelson*, 62 N. Y. 286.) Plaintiff's proper proceeding was by an application in the original action in the Supreme Court to have the judgment, recovered against her therein by Prentice, set aside for want of service of process upon her. (*Fullan v. Hooper*, 18 How. Pr. 75; *Dobson v. Pearce*, 12 N. Y. 156; *Grant v. Vandercook*, 57 Barb. 175; *Hunter v. Lester*, 18 How. Pr. 347; *Simonson v. Blake*, 12 Abb. Pr. 331; *Park v. Park*, 80 N. Y. 156; Code Civ. Pro. §§ 1479, 1932, 1937.) Plaintiff shows no cause of action. (*Denton v. Noyes*, 6 Johns. 296; *Vilas v. P. & M. R. R. Co.*, 123 N. Y. 440; *Taylor v. Trask*, 7 Cow. 249; *Blodget v. Conklin*, 7 How. Pr. 442; *Sterne v. Bentley*, 3 id. 331; *A. Ins. Co. v. Oakley*, 9 Paige, 496; *Brown v. Nichols*, 42 N. Y. 26; *Williams v. Van Valkenbury*, 16 How. Pr. 144; *Ferguson v. Crawford*, 70 N. Y. 253; *Ellsworth v. Campbell*, 31 Barb. 134; *Hammond v. Harris*, 2 How. Pr. 113; *Hunter v. Lester*, 18 id. 347.)

PARKER, J. Before any evidence was taken, the defendant Tucker moved to dismiss the complaint. The motion was not passed upon, the referee reserving his decision.

After the plaintiff rested, the defendant again made a motion to dismiss the complaint, but no ruling was made, the referee again reserving decision.

The defendants thereafter introduced evidence, both oral and documentary, in support of their position, and rested. The motion to dismiss the complaint was not then nor thereafter renewed.

The plaintiff called several witnesses in rebuttal, and was permitted to amend his complaint on terms, after which the testimony was closed, and the "case summed up and submitted" to the referee.

Subsequently the referee made a report dismissing the complaint, which report did not contain any findings of fact. Nor did he at any time make, nor was he requested to make, any such findings, the plaintiff contenting herself by filing exceptions to the report.

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The question is, therefore, presented, whether the judgment can be reviewed, because of the failure of the referee to comply with section 1022 of the Code of Civil Procedure, which provides that "the decision of the court, or the report of the referee, upon the trial of the whole issue of fact, must state separately the facts found and the conclusions of law."

This neglect of the referee, if neglect it was, could have been remedied at the instance of the plaintiff in the manner provided by the Code, but no attempt was made in that direction. Indeed, the plaintiff did not even submit to the referee a written statement of the facts, which she deemed established by the testimony.

We held in *Wood v. Lary* (124 N. Y. 83) that in every case heard by a referee, if any evidence be presented, a decision stating separately the facts found and the conclusions of law based thereon must be made, otherwise the judgment will not be reviewed. *Place v. Hayward* (117 N. Y. 487) does not oppose, but supports such determination. In that case the defendant's counsel at the close of plaintiff's evidence, without announcing that he had rested his case, asked for and obtained a dismissal of the complaint. Afterwards the referee made his report containing findings of fact and of law. It was held that what the referee did was to nonsuit the plaintiffs, and, therefore, he should have made no findings of fact, except such as would justify a nonsuit.

Judge EARL, speaking for the court, said: "Under the Code the referee was required to make findings of fact and of law after granting the nonsuit, but he had no right to make any findings of fact depending upon disputed or inconclusive evidence."

That it was the view of the court that in case of a nonsuit before a referee the facts found must be in accord with the testimony most strongly supporting the plaintiff's contention, is evidenced not only by the discussion of facts, with which the opinion abounds, but also by the sentence following the one last quoted, "therefore to maintain this judgment, the defendant is bound to show that there is no disputed question

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of fact which, upon a jury trial, the court would have been required to submit to the jury, and that upon the undisputed evidence he was entitled to judgment." In *Forbes v. Chichester* (125 N. Y. 769), the referee made a report dismissing the complaint, to which the plaintiff's counsel excepted, and then Judge EARL remarks in his opinion, the referee "made formal findings of fact and law as he should have done, and proper exceptions were taken to them by plaintiff's counsel."

It seems to be settled, therefore, that findings of fact are necessary, even when the complaint is dismissed at such a stage of the hearing as to entitle it to be treated as a nonsuit.

It is certainly not the less important that the statutory requirement in such respect should be insisted upon when the testimony is all in, the arguments of counsel made, and time for deliberation by the court or referee taken.

In such a case this court held in *Bridger v. Weeks* (30 N. Y. 328) that the judgment would not be reviewed, and, so far as we have observed, the position then taken has been steadily maintained.

The appeal should be dismissed.

All concur, except LANDON, J., dissenting, and BRADLEY, J., not voting.

Appeal dismissed.

THE SENECA NATION OF INDIANS, Appellant, v. WELLINGTON
HUGABOOM, Respondent.

Courses and distances mentioned in a conveyance must yield to the lines as actually and duly made by survey and described by marks and monuments, and while a line is given as running between two points will be presumed to be a straight one, where a reference is made to a survey which shows the line not to be a straight one, it will control.

In an action of ejectment brought by plaintiff pursuant to the act of 1845 (Chap. 150, Laws of 1845), plaintiff claimed title under the treaty of 1803, between it and the Holland Land Company, and a deed executed in pursuance thereof, by which a portion of the south line of the lands reserved and released to said plaintiff is described as running west from a post a certain number of chains. The description closes with a statement that the lands described were to be held by plaintiff "in the same manner

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and by the same tenor as the lands reserved " by plaintiff by a treaty or convention entered into September 15, 1797. The description also referred to a meridian line at the east line of the tract and to artificial monuments placed at the corners. Under the treaty of 1797 a survey of the lands was made and the line plainly marked; the meridian line referred to in the treaty of 1803 was located by and the monuments placed under that survey. If the south line was to be taken as a straight one between the two points given, the land in question would be included in the reservation, but it was not included by the south line as shown by the survey. It also appeared that the south line as defined by the marks and monuments had been treated and designated as the southern boundary from the earliest time within the memory of witnesses; that a fence had been erected upon it in 1829, which has since remained, and the lands south of it have been occupied by defendant and his predecessors in title. *Held*, that the evidence authorized the conclusion that the line as surveyed was the southern boundary of the reservation, and so sustained a verdict for defendant.

Pursuant to an act of Congress of 1878 (Chap. 139), authorizing a re-survey of the reservation, a survey was made and duly approved; by this the south line in question was run as a straight line; plaintiff claimed under this survey. *Held*, that the survey so made did not, by changing the location of the line, have the effect to enlarge the reservation.

It was claimed on behalf of plaintiff that the Indians, being wards of the nation, could not be bound by practical location founded on acquiescence. *Held*, untenable; that as plaintiff's right to sue was given by and dependent upon the said act of 1845, which provides that actions "may be brought and maintained * * * in the same manner * * * as if brought by citizens of the state," in adopting the remedy, it was taken subject to the conditions.

(Argued March 23, 1892; decided April 26, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant, entered upon a verdict and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hudson Ansley for appellant. The plaintiff is entitled to all the lands embraced in the treaty sanctioned by the government, to it. (*Marble v. McMinn*, 57 Barb. 610; *Fellows v.*

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Deniston, 23 N. Y. 420.) The construction of the boundary line under this treaty must be determined from the instrument itself. (*Higginbotham v. Stoddard*, 9 Hun, 1; *Waugh v. Waugh*, 28 N. Y. 94; *Clark v. Beard*, 9 id. 183; *Rayner v. Timerson*, 46 Barb. 518; *Drew v. Smith*, 46 N. Y. 204; *White v. Williams*, 48 id. 344; *Hingsland v. Chittenden*, 6 Lans. 15; U. S. R. S. 2396, § 2; *Corning v. T. I. & N. Foundry*, 44 N. Y. 577; *People v. Dibble*, 16 id. 203.)

W. S. Thrasher for respondent. The original line as marked upon the land as and for the reservation boundary must control and determine the rights of the parties when found, whether it conforms to the verbal description of the treaty or not, and course, distance or map must give way to the marked line when that marked line is found. (*Van Wyck v. Wright*, 18 Wend. 157; *Jackson v. Freer*, 17 Johns. 29; *Wendell v. People*, 8 Wend. 190; *Rayner v. Timerson*, 46 Barb. 525; *Robinson v. Kime*, 70 N. Y. 154; *Newson v. Prior's Lessee*, 7 Wheat. 7, 8, 10; *Preston v. Bowman*, 6 id. 580; *Doe v. Thompson*, 5 Cow. 371.)

BRADLEY, J. The action is ejectment, and was brought in the name of the plaintiff, pursuant to statute. (L. 1845, ch. 150; 4 Edin. 375.)

It is alleged that the land in question is a part of the Cataraugus Indian Reservation, by which the defendant's land is bounded on the north. The contest has relation to the location of the south line of the reservation. The plaintiff put in evidence a treaty made with the Seneca nation in 1797, and known as the Robert Morris treaty, also one of June 30, 1802. And it is insisted that by the latter, which describes the lines of the reservation, it is established that the defendant has in his possession a strip something over two chains in width of the plaintiff's land. The defendant's contention is to the contrary, and the determination of the question was at the trial made dependent upon the fact whether the south line in question was straight or was governed by a line not entirely so, which

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had been run prior to the treaty of 1802. By the treaty of 1797 with Robert Morris and the deed then made pursuant to it by the sachems, chiefs and warriors of the Seneca nation the Indian title to a large portion of land commonly known as the Holland Land Company purchase was extinguished, and certain lands were reserved and excepted from the grant. The Holland Land Company having purchased the land and taken the right of pre-emption from Robert Morris, caused in 1798 a survey of the reservation in question to be made and the lines of its boundaries to be made and described, in 1802 made a treaty with that nation of Indians, and pursuant to it a deed was then made by and between the parties to such treaty whereby the Seneca nation exchanged with the Holland Land Company certain lands reserved by the treaty of 1797, and that company, by its representatives in consideration thereof (reserving the right of pre-emption) exchanged, ceded and released to the nation the land embracing the reservation in question, which was bounded and described as follows: "Beginning at a post marked No. 0, standing on the bank of Lake Erie, at the mouth of Cattaraugus creek, and on the north bank thereof; thence along the shore of said lake N. 11 degrees, E. 21 chains; N. 13 degrees, E. 45 chains; N. 19 degrees East, 14 chains, 65 links to a post; thence East one hundred and nineteen chains to a post; thence south fourteen chains, twenty-seven links to a post; thence east six hundred and forty chains to a post standing in the meridian between the 8th and 9th ranges; thence along said meridian south six hundred and seventeen chains, seventy-five links to a post standing on the south bank of Cattaraugus creek; thence west one hundred and sixty chains to a post; thence north two hundred and ninety chains, twenty-five links to a post; thence west four hundred and eighty-two chains, thirty-one links to a post; thence north two hundred and nineteen chains, fifty links to a post standing on the north bank of Cattaraugus creek; thence down the same, and along the several meanders thereof to the place of beginning, to hold to the said parties of the first part" (the Seneca nation of Indians) "in the same manner and by the same tenor

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as the lands reserved by the said parties of the first part in and by said treaty or convention entered into on Genesee river the fifteenth day of September, 1797."

The south line in question of the reservation is that above described as "thence west four hundred and eighty-two chains, thirty-one links to a post." Each of those treaties was conducted, on the part of the Seneca nation, by a commissioner duly appointed for the purpose. There is no dispute about the location of the corner at the east end of that line, nor substantially any about that at its west end.

The survey represented the boundary lines quite definitely by reference to distances with pointers and by witnesses to corners, and by it the line in question there mentioned as "thence west on said sixth parallel six miles, two chains and thirty-one links," was in that manner described with particularity.

The defendant relies upon the line as located by the Holland Land Company. And the plaintiff depends upon the line as surveyed in 1878 pursuant to the act of congress of May 25, 1878 (Ch. 139), entitled "An act to authorize the survey of the Cattaraugus Indian reservation of the state of New York," which authorized the secretary of the interior to cause the reservation "to be resurveyed in accordance with the original survey thereof and the exterior boundaries thereof to be marked by stone or iron monuments" at the expense of the Seneca Nation of Indians, who were authorized to select a surveyor to be approved by the secretary of the interior, who was authorized to pay the surveyor out of moneys under his control belonging to the nation of Indians. And it was further provided that the surveyor should make plats of the reservation showing the lines of the exterior boundaries, etc., to be submitted to the commissioner of the general land office for examination and approval. There was also a general statute on the subject, which provided that "whenever it becomes necessary to survey any Indian or other reservation or any lands, the same shall be surveyed under the direction and control of the general land office and as nearly as may be in con-

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formity to the rules and regulations under which other public lands are surveyed." (U. S. R. S. § 2115.) The surveyor was selected, he made a survey which was duly approved, and by it he treated the south line as straight and so ran it. This line so run and located included in that north of it a strip upwards of eight rods in width of the land occupied by the defendant as part of his farm. The line as described in the treaty would, if nothing appeared to the contrary, be presumed to be a straight one between its two terminal points. (*Kingsland v. Chittenden*, 6 Lans. 15.) And such is the statutory direction for making surveys of public lands when the boundary lines have not before been actually run and marked. (U. S. R. S. § 2396.) This rule would necessarily be applicable to the line in question if it had not been actually located by the previous survey. And if it had, the survey made upon the statutory direction or authority before mentioned could not have the effect to enlarge the reservation by change in the location of the line.

The proposition is too well settled to require any reference to authorities on the subject, that courses and distances mentioned in conveyances must yield to the lines as actually and duly made by survey and described by marks and monuments of land conveyed. It is, however, said that there was not nor could have been any line adopted by practical location founded upon acquiescence, because the Indians being wards of the government could not in that manner be charged with accepting it as such. That is true, and the line was not at the trial treated as in that manner established. But in *Seneca Nation v. Christie* (126 N. Y. 122) the court expressed the opinion that as the right of the plaintiff to sue was given by and dependent upon the statute (L. 1845, ch. 150) which provided that actions might so "be brought and maintained * * * in the same manner and within the same time as if brought by citizens of the state," the Statute of Limitations was a bar to an action thus brought. And this was put upon the ground that in adopting the remedy given by the statute it is taken subject

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to the conditions there mentioned. It was fairly inferable that the line was run in 1798 in view of a treaty to be afterwards made and which was had in 1802. The line was plainly marked. And while the treaty did not, in terms, refer to the survey, it did refer to and mention lines which had been the result of a survey, and especially so in respect to the eastern terminus of the north line as at a post standing on the meridian between the 8th and 9th ranges, and thence south along such meridian. It thus appeared by the treaty that a meridian line had before then been located, and designated as the east line of the tract, and that artificial monuments had been placed at the corners. This evidently was done by the survey of 1798. And this was sufficient reference in the treaty to the survey to justify the inference that it, as made, described the lines of boundaries of the reservation. Inasmuch as it so appeared, the lines as actually made by the survey properly might control in that respect. There was evidence tending to prove the location of this south line as then surveyed, run and marked. And as thus it was represented by the old field notes giving not only the details as to distances, with pointers and witnesses, but also topography. Furthermore, it appears that this line so marked, has been treated and designated as the southern boundary of this portion of the reservation from the earliest time within the memory of witnesses. Then it was plainly defined by the marks and monuments of the surveyor, and as early as 1829 a fence was erected on it as the north line of land adjoining the reservation on the south, and fence has since remained there, and from that time the premises in question south of the fence have been occupied by defendant and those under whom he claims title. The line was recently before the trial traced by a surveyor and the marks of the line of 1798 sufficiently found to enable him to do so. The evidence was sufficient to permit the conclusion that this line was the southern boundary of the reservation mentioned in the treaty of 1802; and, therefore, the exceptions founded upon the proposition that it was otherwise, as matter of law, were not well taken.

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The question whether the plaintiff was entitled to the possession of any land occupied by the defendant south of that line was treated by the court as one of fact and was submitted to the jury. They found for the defendant. There was no error.

The judgment should be affirmed.

All concur.

Judgment affirmed. _____

182 499
155 125

WILHELMINE STERGER, Appellant, v. J. WYCKOFF VAN SICKLEN, Respondent.

An owner may ordinarily exercise such dominion over and make such use of his real estate as he chooses, provided the rights of others are not thereby violated, and the use to which he puts his property is not of such a public character that he is bound to observe reasonable care in keeping it in a condition to save harmless those invited to come upon it for his benefit and profit.

The covenant of a landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach.

It seems that one who enters upon the premises of another upon lawful business, by the express or implied invitation of the proprietor, has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him, so that no injury may occur, and as to him the owner is chargeable with the duty of exercising that degree of care.

Where, however, one enters upon the premises of another as a mere licensee, without any enticement or inducement, he does so at his own risk, and as to him the owner owes no duty of care or vigilance.

The fact that the premises are leased with a condition that the owner may re-enter to make repairs, does not enlarge his responsibility as to third persons.

In an action to recover damages for personal injuries, the following facts appeared: Defendant owned certain premises, which he had leased to one L.; the steps leading from a stoop in the rear of the building on the premises to the ground were decayed; defendant knew of this and had agreed to repair them. Plaintiff occupied the adjoining premises, the two lots being separated in the rear by a fence through which an opening had been made by knocking off boards. Plaintiff went through said opening to defendant's house, not at the occupant's invitation or on a matter of common interest, and on coming out one of the steps broke and she received the injuries complained of. The complaint was dis-

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missed. *Held*, no error; that plaintiff was a mere licensee and no duty was imposed upon defendant requiring the exercise of any care to protect her.

Timlin v. Standard Oil Co. (126 N. Y. 514); *Beck v. Carter* (68 id. 283), *Clancy v. Byrne* (56 N. Y. 129); *Swords v. Edgar* (59 id. 28), distinguished.

(Argued March 14, 1892; decided May 3, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit, and also affirmed an order denying a motion for a new trial.

By this action the plaintiff seeks to recover damages for injuries sustained under the following circumstances:

On the afternoon of June 20, 1886, while descending the steps leading from the ground to the rear stoop of the premises known as No. 68 Schenck avenue, Brooklyn, a step broke, causing her to fall and resulting in injury. The premises were owned by the defendant, but occupied by one Leopold, a tenant, who entered into possession about the 1st of March, 1884. The plaintiff occupied the house next adjoining and between four and five feet from the one in which Leopold resided. The premises were separated in the rear by a fence through which an opening had been made by knocking off some of the boards. It appeared that the defendant knew of the condition of the steps and agreed to repair them, and he offered evidence tending to show that he made an agreement with the tenant by which he was to make the repairs for a fixed sum which was deducted from the rent. This testimony was to some extent controverted, and plaintiff's counsel having asked to go to the jury before the court dismissed the complaint, the refusal of such request is assigned for error on this review.

Further facts are stated in the opinion.

James D. Bell for appellant. If the premises were in an unsafe and insecure condition, to defendant's knowledge when he rented them, he is liable in this action, although he was not

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in actual possession at the time the injury happened. (*Hungerford v. Bent*, 8 N. Y. Supp. 614; *Edwards v. R. R. Co.*, 98 N. Y. 247; *Ahern v. Steel*, 115 id. 203; *Davenport v. Ruckman*, 37 id. 568, 574; *Timlin v. S. O. Co.*, 126 id. 514.) The duty of a landlord of demised premises, which he has agreed to keep in repair towards persons lawfully upon the premises, is to keep them in such state of repair as that they will not suffer injury. (*Palmer v. Deering*, 93 N. Y. 7; *Pell v. Reinhart*, 127 id. 381; *Odell v. Solomon*, 99 id. 635; *Anderson v. Kryter*, 9 Cent. L. J. 385.)

A. Simis, Jr., for respondent. The plaintiff was not upon the premises where she was injured by reason of any invitation from defendant, either express or implied. He was under no duty or obligation to her to keep said premises in repair; consequently there was no negligence as to her which can give a right of action. (*Larremore v. C. P. I. Co.*, 101 N. Y. 391.) The defendant's covenant with Mrs. Leopold to keep her premises in repair, upon which plaintiff relies, does not inure to the benefit of the plaintiff; such covenant can only be enforced by the covenantee or his assigns. (*Odell v. Solomon*, 99 N. Y. 635.) If it be held that the defendant did agree to repair, then such a promise, before it could create a liability, would have to bear a new consideration. (*Flynn v. Hatton*, 43 How. Pr. 333.)

PARKER, J. We are of the opinion that the evidence does not permit a recovery.

No contractual relation exists between the plaintiff and defendant. The covenant of the landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach. (*Odell v. Solomon*, 99 N. Y. 635.)

But when the occasion of the injury constitutes a nuisance as to the party complaining, then a landlord may be chargeable in damages on the ground that he maintains a nuisance, where the contract of letting contains a covenant authorizing him to re-enter for the purpose of making repairs. (*Ahern v. Steele*, 115 N. Y. 203.)

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We are thus brought to the question whether the decayed steps in the rear of defendant's premises leading from the ground to a stoop constituted a nuisance as to the plaintiff, who occupied an adjoining house. If so, the defendant, by reason of his covenant to repair, may be responsible for the injury occasioned to the plaintiff while walking down them.

This inquiry admits of but one answer and does not seem to be worthy of the citation of authority, but it may not be out of place to refer to the cases cited by the appellant.

It may be observed in passing that the owner may ordinarily exercise such dominion over and make such use of his real estate as he chooses, provided the rights of others are not thereby violated.

No right of the plaintiff was violated. The enjoyment of the premises occupied by her was not interfered with. Had she remained on them the injury would not have occurred. But she chose to go on private property and up or down back steps, over which she had no authority and as to which she had acquired no such interest by contract, or otherwise, as would have entitled her to demand as a right that the so-called nuisance be abated. As to her it was not a nuisance, because it did not invade either her property or personal rights. (*Murphy v. City of Brooklyn*, 98 N. Y. 642.)

Appellant cites *Timlin v. Standard Oil Company* (126 N. Y. 514), where it is held that if an owner lease premises without abating an existing nuisance, he is liable to respond in damages for an injury resulting therefrom. But that case has no application here. The nuisance complained of was dangerous to the public and the adjoining owner. The wall of a building was so out of repair that it fell over upon the tracks of a railroad company, killing plaintiff's intestate while engaged in repairing the track.

In *Beck v. Carter* (68 N. Y. 283), the owner made an excavation on his own land, but so near to the highway as to render travel thereon dangerous and failed to guard it, and the instruction of the trial court to the jury that the excavation was a nuisance if made in the highway, or so near it that a

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person exercising ordinary care was liable to fall into it, was sustained. The court holding that the circumstances of that case imposed a duty on the defendant to protect the excavation.

It appeared that the excavation had been made in a place long used by the public, and the character of the user was thus described by the court: "It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place and part of the highway."

While the court held that the situation presented by the evidence supported the judgment, it did not fail to emphasize the general rule that the owner of property has the right to put his property to such use as he chooses, "and, in the absence of special circumstances, if a person traveling on a highway deviates therefrom and falls into a pit or excavation on the adjacent land, the owner is not responsible for the resulting injury."

There are cases where the use to which an owner of property puts it is of such a public character that he is bound to observe reasonable care in keeping it in such a condition as to save, harmless, those who are invited to come on to it for the benefit and profit of the owner. Cases of this kind are considered by this court in *Clancy v. Byrne* (56 N. Y. 129). A drayman, in the ordinary course of his business, drove a horse upon Pier No. 34, North river, and a rotten plank giving way, the horse fell through and was killed. In the opinion by FOLGER, J., it is said that the occupant is liable for an injury to the property of a person lawfully upon it therewith. "This is not put upon the ground that the south half of the pier was a public place or highway. It was private property to a certain degree, though held as such for public objects. * * * By the use to which it was put by the occupant, from which a profit to him was directly or indirectly derived, and which persons of the calling of plaintiff aided, there was a license and an invitation given to the plaintiff to come and go on this pier in the following of his employment" * * * and thus "was imposed on him the duty of taking care, so long as

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it was thus kept open, that those who had a lawful right to go there could do so without danger to their property."

Swords v. Edgar (59 N. Y. 28) was a case of injury by a defective pier, and the court said, "though the pier be private property, and though it be granted that the owner or occupant thereof might at any time close it and refuse entrance upon it to any and all persons, yet so long as it was kept open to that portion of the public of which the intestate was one, for the profit of defendant's lessees, there was upon such lessees, primarily, the duty of taking care so long as it was thus kept open, that those who had lawful right to go there, could do so without incurring danger to their persons."

But a further consideration of cases is neither needful nor useful. No case has been found, nor do I think can be, which supports the contention that, as to this plaintiff, the decayed back stairs of a private residence, under the circumstances proven, constituted a nuisance.

As there is no injury, in a legal sense, which can give a right of action, unless it is occasioned by a violation of some duty owing to the injured, there remains for consideration but one other ground on which it is claimed that defendant's liability can be predicated.

It is urged that a recovery can be supported because the defendant negligently permitted the stairs to remain in an unsafe condition. The question is, therefore, presented: Did the defendant's duty require the exercise of any care to protect the plaintiff while on the premises?

The fact that a landlord leases premises, with a condition that he may re-enter for the purpose of making repairs, does not enlarge his responsibility as to third persons, or burden him with the duty as to them of observing any greater degree of care than would be required were he in possession.

As it may tend to avoid confusion, therefore, we will consider the question of negligence from the standpoint of actual occupation by the owner, this defendant.

It will be well to get in mind, first, the situation of the premises and the circumstances surrounding and leading up to

the injury. For such purpose, we will take the testimony of the plaintiff.

At the time of the injury she occupied a house next to, and between four and five feet from the house of defendant, where the injury occurred. Between the houses was a fence, and in the rear of the houses an opening had been made by knocking some boards off. Her little girls were accustomed to go into the yard and play, and on the 20th of June, 1886, about half-past five in the afternoon, plaintiff went over to bring the children home. They were then in the house, and as she was walking down the back steps holding one of them by the hand, the fourth or fifth step from the bottom broke and her foot went through, causing her to fall to the ground, resulting in injury.

From these facts it appears that the plaintiff was not brought within the risk of these unsafe steps by the occupier's invitation on a matter of common interest, or in the exercise of a right. She was, therefore, a mere licensee.

"Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right; it is an excuse or license, so that a party cannot be treated as a trespasser." (MARTIN, B., in 7 H. & N. 745.) The general rule is that a licensee must take the property as he finds it. Mr. Pollock in his work on torts states the rule as follows: "Persons who by the mere gratuitous permission of owners or occupiers take a short cut across a waste piece of land or pass over private bridges, or have the run of a building, cannot expect to find the land free from holes or ditches or the bridges to be in safe repair, or the passages and stairs to be commodious and free from dangerous places." The exceptions to which he alludes need not be mentioned for they are not in point here.

Mr. Pollock cites in support of the rule quoted English decisions mainly, but the same rule has been generally, if not universally, applied in the various jurisdictions in this country.

In *Severy v. Nickerson* (120 Mass. 306) a laborer employed in loading ice on board a vessel from the wharf, after finishing

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his work went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. DEVENS, J., speaking for the court, said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and to one who enters upon lawful business by the invitation, either expressed or implied, of the proprietor is well settled. The former enters at his own risk; the latter has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him in order that no injury may occur."

In *Larmore v. Crown Point Iron Company* (101 N. Y. 391) the plaintiff, an employee of defendant, quit work two days before the injury on account of the supposed danger incident to the work at the pit where he was employed.

At the suggestion of the foreman of that pit he applied at another pit and was engaged to commence work there on the following Monday, and while near a machine used in raising buckets of ore from the mines to the surface of the ground, a lever was thrown out of its socket and flying around struck and broke his legs. It was held that he could not recover, the court saying "he was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation, express or implied, nor was he there in any proper sense on the business of the company. * * * The fact that the plaintiff had on going to pit No. 10 engaged to commence work on the following Monday, did not change his relation to the company or make him other than a mere licensee on the premises."

That case is decisive of the one under consideration, so far as the question of negligence is concerned, for it is an authority for the assertion that plaintiff's own testimony establishes conclusively that while she was on defendant's premises she was at most a mere licensee.

The judgment should be affirmed.

All concur, except HAIGHT, J., not voting.

Judgment affirmed.

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GAVIN J. MOFFATT, Appellant, v. ROBERT FULTON, Impleaded,
etc., Respondent.

182	507
144	712
182	507
171	*248
171	*245

An omission of the averment in the complaint required by the provision of the Code of Civil Procedure (§ 549) authorizing the arrest of a defendant in an action for money received, that the money was received in a fiduciary capacity and forbidding a recovery unless the allegation is proved, may not be taken advantage of for the first time upon appeal; the question must be raised upon the trial.

An express averment that the money was received in a fiduciary capacity is not necessary; a statement of facts showing that it was so received is sufficient, and is the proper pleading (PARKER, J., dissenting).

Plaintiff's complaint alleged in substance that he intrusted his two promissory notes to the defendants, as his agents, to return one with certain explanations and to procure the other to be discounted and remit the net proceeds to him; that they procured both to be discounted, received the proceeds in trust to pay the same to plaintiff, but refused to pay them over on demand and converted them to their own use. The facts proved on the trial were substantially as alleged, with the exception that it appeared defendants were authorized to procure the discount of either of the notes and to return the other with the net proceeds of the one discounted. *Held* (PARKER and BRADLEY, JJ., dissenting), that the averments in the complaint and the proof were sufficient to authorize a judgment enforceable against the person of the defendant, upon whom alone the summons in the action was served.

Moffat v. Fulton (56 Hun, 337), reversed in part.

(Argued March 18, 1892; decided May 3, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of April, 1890, which modified and affirmed as modified, a judgment in favor of defendant, entered upon a verdict directed by the court.

This was an action to recover the proceeds of two promissory notes belonging to the plaintiff, claimed to have been received by the defendants in a fiduciary capacity and converted to their own use.

In the first count of the complaint it is alleged that on the 15th of November, 1886, the plaintiff, a manufacturer of New Haven, Conn., gave to the defendants, who were engaged in business in the city of New York, his promissory note for

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\$908.75, payable three months thereafter, in consideration of goods sold and delivered. On the 15th of February, 1887, shortly before said note became due, the plaintiff made another note dated that day, but in all other respects a duplicate of the first, and sent it by his agent, one McDowell, to the defendants, with the request that they should indorse it "and have it discounted for cash and remit the funds, less any reasonable charges for commission and discount, to plaintiff immediately, so that he might pay the said note of November fifteenth about to become due and to use the proceeds of said note for no other purpose whatsoever. The defendants thereupon informed the said McDowell that they could not have the said note discounted, but if the plaintiff would send them in its place his note for a less amount, paying a portion of the indebtedness represented by the said note of November 15, 1886, they would immediately have the same discounted and remit the proceeds for the purpose above described. Said defendants requested the said McDowell to leave with them said note dated February 15, 1887, and stated that they would enclose the same on that day to the plaintiff in a personal letter explaining the facts * * * and use said note for no other purpose. Trusting solely to the honesty and integrity of said defendants, said McDowell left said note with them for the purpose of having it returned immediately to the plaintiff and for no other purpose." The defendants never returned the note, but procured the same to be sold or discounted through a broker to an innocent holder, and on the 21st of February, 1887, received the proceeds of said note, less \$21.19 deducted for commission and discount, "in trust to pay the same to the plaintiff forthwith." They used said proceeds in their own business and refused to pay any part thereof to the plaintiff, to his damage, "in the sum of \$887.60, with interest thereon from the 21st day of February, 1887."

The plaintiff alleged in the second count of his complaint that on the 17th of February, 1887, he made his promissory note, bearing the date of February 8, 1887, for \$750.60, payable to the defendants, three months after date. "That there-

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upon the defendants requested the said plaintiff to deliver said note to the defendants to take the place of the note of February 15, 1887, referred to" in the first count of the complaint, "and for the purpose therein more fully set forth, agreeing to indorse said note, have the same discounted or sold, and return the proceeds thereof to the plaintiff forthwith, less the discount and a reasonable commission." In accordance with said request and relying on said agreement, the plaintiff "thereupon * * * delivered said note to the defendants * * * in trust, to indorse and discount or sell the same for cash, and forthwith to pay the proceeds thereof to the plaintiff, less the discount and commission as aforesaid, and for no other purpose whatever." The defendants indorsed the note and procured a bank to discount it, and on the 4th of March, 1887, the proceeds, less \$8.57 charged for discount and commission, were paid to them and they used the same for their own purposes, refusing upon due demand to pay any part thereof to the plaintiff, to his damage in the sum of \$742.09.

The summons and complaint were served only on the defendant Fulton, who appeared and answered, pleading, in substance, a general denial and also a counter-claim, which was successfully demurred to by the plaintiff on the ground that it alleged "facts constituting a cause of action arising on contract, while the cause of action arising out of the facts alleged in the complaint is in tort and not on contract."

Upon the trial the allegations of the complaint were substantially proved, and the plaintiff introduced no evidence. It appeared that the plaintiff paid all of said notes at maturity and that when McDowell left the first note with the defendants they said they would try to have it discounted, and if they succeeded would send the proceeds to the plaintiff, but otherwise they would return the note to him that night, with a letter of explanation. When the plaintiff left the second note with them they said that there was some doubt whether they could get the other discounted, and hence they asked for the smaller one.

At the close of the evidence the defendant moved to dismiss

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the complaint "on the ground that the facts proved do not constitute either a tort, an actionable conversion, or the fiduciary relation in respect to either cause of action." The motion was denied, and he thereupon moved that a verdict be directed in his favor on the same grounds. That motion was also denied and a verdict was directed in favor of the plaintiff for \$1,789.07, being the net proceeds of the two notes, with interest, upon the ground "that the money was received in a fiduciary capacity." The trial judge also held that the facts alleged were "sufficient to maintain a cause of action for a conversion." Judgment was entered accordingly, and at the end of the *postea* was this provision: "But this judgment can be enforced only against the joint property of the defendants herein and the separate property of the said defendant Robert Fulton, who was served as aforesaid, and against the person of the said defendant Robert Fulton." The defendant Fulton appealed from the entire judgment and the General Term modified it by striking out the words "and against the person of the said defendant, Robert Fulton," but affirmed it in all other respects. The plaintiff appealed to this court from that part of the judgment of affirmance which modified the judgment of the trial court.

Henry W. Taft for appellant. The averments of the complaint were sufficient under subdivision 2 of section 549 of the Code to sustain an action for money received in a fiduciary capacity, and the evident intent was to maintain that form of action. (Laws of 1886, chap. 672; *King v. Mackellar*, 109 N. Y. 215; *Knapp v. Simon*, 96 id. 284; *Lounsbury v. Purdy*, 18 id. 511; *McBride v. Langan*, 18 Civ. Pro. Rep. 201; *Duguid v. Edwards*, 50 Barb. 288; *Murray v. Burling*, 10 Johns. 175; *Holbrook v. Homer*, 6 How. Pr. 86; *Burhans v. Casey*, 4 Sandf. 707; *Frost v. McCarger*, 14 How. Pr. 131; *Ostell v. Brough*, 24 id. 274; *Wallace v. Castle*, 14 Hun, 106; *C. Co. v. C. Co.*, 24 How. Pr. 274; *Comstock v. Hier*, 73 N. Y. 275; *Clark v. Pinkney*, 50 Barb. 226; *Stoll v. King*, 8 How. Pr. 298; *Schudder v. Shields*, 17 id. 420; *Leon v. Bernheimer*, 10 Wkly. Dig. 288; *Malcolm*

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v. *O'Reilly*, 14 id. 316; 14 J. & S. 222; *Bearns v. Gould*, 77 N. Y. 455; *Rector v. Clark*, 78 id. 21; *Thayer v. Marsh*, 75 id. 340; *A. B. H. M. Society v. Foote*, 52 Hun, 307; *Frets v. Frets*, 1 Cow. 335; *Allen v. Johnson*, 16 Johns. 205; *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Partridge v. Badger*, 25 Barb. 146; *Cady v. Allen*, 22 id. 388; *Nelson v. Eaton*, 15 How. Pr. 305; *Harway v. Mayor*, 1 Hun, 628; *Conaughty v. Nichols*, 42 N. Y. 83; *C. N. Bank v. N. P. Bank*, 32 Hun, 105, 110; *Veeder v. Cooley*, 2 id. 74; *Byxhie v. Wood*, 24 N. Y. 607; *Graves v. Waite*, 59 id. 156; *Freer v. Denton*, 61 id. 492; *Ross v. Terry*, 63 id. 614; *Neftel v. Lightstone*, 77 id. 96; *Sparman v. Keim*, 83 id. 245; *Falkland v. S. N. N. Bank*, 9 Wkly. Dig. 2; *Bosworth v. Higgins*, 26 N. Y. S. R. 474; *Tuers v. Tuers*, 100 N. Y. 196; *Decker v. Matthews*, 12 id. 313.) The facts proven upon the trial made out a cause of action as to both notes for money received in a fiduciary capacity. (*Frost v. McCarger*, 14 How. Pr. 131; *Beardsley v. Root*, 11 Johns. 464; *Ainslie v. Wilson*, 7 Cow. 662; *Allen v. Brown*, 44 N. Y. 233; *Witherby v. Mann*, 11 Johns. 518; *Bonney v. Seely*, 2 Wend. 481; *Gilchrist v. Cunningham*, 8 id. 641; *Rodman v. Hidden*, 10 id. 499; *Clark v. Fairchild*, 22 id. 582; *Briggs v. C. N. Bank*, 61 How. Pr. 250; 89 N. Y. 182; *Pratt v. Foote*, 9 id. 463; *F. N. Bank v. Leach*, 52 id. 350; *Comstock v. Hier*, 73 id. 276; *Coddington v. Bay*, 20 Johns. 637; *Decker v. Matthews*, 12 N. Y. 313; *People v. Dennison*, 84 id. 272; *Lehmair v. Griswold*, 8 J. & S. 100; *Nash v. White's Bank*, 13 Wkly. Dig. 141; *X. B. Bank v. Lee*, 7 Abb. Pr. 372; *Ashins v. Hearne*, 3 id. 184; *Pattison v. Richards*, 22 Barb. 143; *Gottler v. Babcock*, 7 Abb. Pr. 392; *Devlin v. Coleman*, 50 N. Y. 537; *Hynes v. Patterson*, 95 id. 4; *Piser v. Stearns*, 1 Hill, 89; *Astell v. Brough*, 24 How. Pr. 274; *Stoll v. King*, 8 id. 298; *Holbrook v. King*, 6 id. 86; *Rider v. Whitlock*, 12 id. 209; *Robbins v. Seithel*, 20 id. 366.)

Arthur R. Robertson for respondent. The allegations of the complaint are in *tort*, and must give character to the action.

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Recovery should not be permitted upon any other theory. (*Walter v. Bennett*, 16 N. Y. 250; *Ross v. Mather*, 51 id. 108; Code Civ. Pro. § 501; *Segelken v. Meyer*, 94 N. Y. 184; *Hathaway v. Johnson*, 55 id. 97; *Morris v. Rexford*, 18 id. 552; *Greentree v. Rosenstock*, 61 id. 589.) The complaint should have been dismissed at the close of the case, for the reason that the facts disclosed wholly negated all idea of conversion of the note, and were entirely inconsistent with any claim that the defendants received any of the alleged proceeds in a fiduciary capacity. (94 N. Y. 484; *Greentree v. Rosenstock*, 61 id. 583, 590; *Wood v. Henry*, 40 id. 124; *Walter v. Bennett*, 16 id. 250; *Stoll v. King*, 8 How. Pr. 298; *Bussing v. Thompson*, 15 id. 97; *Donovan v. Cornell*, 9 Civ. Pro. Rep. 224; *Wallace v. Castle*, 14 Hun, 106; *Duguid v. Edwards*, 50 Barb. 300; *Liddell v. Paton*, 7 Hun, 196; *Morange v. Waldron*, 6 id. 529; *McBurney v. Martin*, 6 Robt. 502.) The judgment of the trial court as entered was unwarranted, for the reason, among others, that it provided for an execution against the person. (*Madge v. Puig*, 71 N. Y. 608; *Miller v. Schneider*, 2 id. 262; *Brown v. Treat*, 1 Hill, 225; *Suydam v. Smith*, 7 id. 182; *Decatur v. Goodrich*, 26 Wkly. Dig. 255.) No execution could be allowed against the person because there was no express, specific allegation that the money referred to in either cause of action was received in a fiduciary capacity.) *Hillis v. Belckert*, 53 Hun, 499; *Bartlett v. Sutorius*, 25 N. Y. S. R. 629; *Harland v. Howard*, 32 id. 872.) Whatever questions may arise on the complaint, demurrer, judgment or other proceedings on plaintiff's part, are to be construed strictly against him, and this notwithstanding the provisions of section 519 of the Code as to liberal construction. (*Clarke v. Dillon*, 97 N. Y. 360; *Hathaway v. Johnson*, 65 id. 93; *Morris v. Talcott*, 97 id. 100-107; *S., etc., N. Co. v. Sherwin*, 1 Civ. Pro. Rep. 46; *Miller v. Schneider*, 2 N. Y. 262.)

VANN, J. The Code provides that a defendant may be arrested in certain actions and, among others, in an action

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brought to recover damages for "a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; a breach of promise to marry; misconduct or neglect in office or in professional employment; fraud or deceit; or to recover a chattel, where it is alleged in the complaint that the chattel has been concealed" in a certain manner and with a certain intent; "or to recover for money received, or to recover property, or damages for the conversion or misapplication of property, when it is alleged in the complaint that the money was received, or the property was embezzled, or fraudulently misapplied by a * * * factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action." (Code Civ. Pro. § 549.)

The General Term based its judgment of reversal upon the ground that there was no express averment in the complaint that the money in question was received by the defendants in a fiduciary capacity, although one of the learned judges dissented from that conclusion. (*Moffatt v. Fulton*, 56 Hun, 337.) No such point, however, was taken at the Circuit. The sufficiency of the complaint was not questioned upon the trial, except by a motion to dismiss, made before any evidence was given upon the ground that the first count did "not contain facts sufficient to constitute a cause of action, and particularly, that it did not set forth facts constituting an action in tort;" that the second count did "not set forth facts constituting a cause of action either in tort or on contract;" and that the complaint united "an alleged cause of action proceeding upon the theory of tort, with one proceeding on the theory of contract." The motion at the close of the evidence was not based upon the facts alleged, but on "the facts proved." Even, therefore, if it was necessary to specifically allege that the money was received by the defendants, as agents, in a fiduciary capacity, advantage could not be taken of the omission for the first time upon appeal. (*Lounsbury v. Purdy*, 18 N. Y. 515; *Coving v. Altman*, 79 id. 167; *Knapp v.*

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Simon, 96 id. 284.) If the point had been raised, a formal amendment might have been allowed.

But, assuming that the question was properly raised, we do not think that it called for a reversal of the judgment rendered by the trial court, because it is sufficient to set forth the facts showing that the money was received in a fiduciary capacity, without copying the words of the statute, which would be pleading a mere conclusion of law. It was clearly the intention of the legislature by its last amendment of section 549, to require a plaintiff, intending to arrest the defendant, to predicate his action upon some ground of wrongdoing mentioned in the statute, as a substantive part of the cause of action, so that he could defend himself before a jury and recover costs if such defense was successful. (L. 1886, ch. 672; Code Civ. Pro. § 549.)

The statute does not direct the plaintiff to state in his complaint that he claims the right to arrest the defendant. Such a statement in order to be effective as a notice would have to appear in the summons rather than the complaint, as the former must, while the latter need not be, personally served. No change was made where the right to arrest depended on the nature of the action, as in the case of fraud, deceit, conversion and injuries to person or property. The right of arrest, however, as it had previously existed, in so far as it depended upon extrinsic facts, that is upon facts not appearing in the complaint, was changed, except as provided in section 550, which is a substitute for the old writ of *ne exeat*, not by abolishing the right of arrest, but by requiring the facts which theretofore had been stated in part outside of the complaint, to be stated in it, as a part of the cause of action. The practice was thus made uniform, so that the complaint must now set forth the facts upon which the right to arrest depends in all cases, with the single exception aforesaid, just as formerly it was required in a majority of cases. The amendment as we construe it, introduced no new rule of pleading into the Code. It did not authorize the pleader to allege a conclusion of law instead of the "plain and concise statement of the facts,"

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required by section 481. It changed the nature of certain causes of action somewhat, by requiring facts to be alleged and proved in addition to those previously required to be alleged or proved, in order to recover. If, therefore, the complaint under consideration sets forth facts showing that the defendant, as agent, received the proceeds of the two notes, in a fiduciary capacity, and converted them to his own use, it is sufficient, without characterizing those facts or repeating the language of the statute. The facts, as alleged, were, in substance, that the plaintiff entrusted his two notes to the defendants, as his agents, to return one with certain explanations and to procure the other to be discounted and forthwith remit the net proceeds to him. Exceeding their authority as to one note, they procured both to be discounted, received the proceeds, refused to pay them over on demand and converted them to their own use. The facts as proved were substantially the same, except that the defendants were authorized to procure the discount of either note and to return the other, with the net proceeds of the one discounted. The notes belonged to the plaintiff, and when they were discounted the proceeds belonged to him. The defendants had no right to either, except as the agents of the plaintiff. Agency is a fiduciary relation. It exists by virtue of the *fiducia*, or faith reposed, as where one man, confiding in another, entrusts his property to him for a particular purpose, and in the belief that he will in good faith use it for no other purpose. Property thus received is received in a fiduciary capacity, and when the property is turned into money, that is also received in a fiduciary capacity. It does not belong to the agent, who can lawfully exercise no power or authority over it, except for the benefit of his principal, and only as authorized by him. If the agent uses it for his own purposes, or fails to pay it over upon a seasonable demand duly made, it is a conversion of that which does not belong to him. The capacity in which the defendants received the notes was fiduciary in character, because it depended upon trust and confidence reposed in them by the plaintiff, as his agents. (*Goodrich v. Dunbar*, 17 Barb. 644, 646; *Republic of*

Dissenting opinion, per PARKER, J.

Mexico v. De Arangoiz, 5 Duer, 640; *Wolfe v. Brouwer*, 5 Robt. 601.)

He trusted them to handle his property as he directed, and they agreed. After they had received the money on the notes, they had no right to keep it, or even to pay it out on his account, but it was their duty to at once pay it over to him. They received it in trust for him, and the refusal to pay it over was not a refusal to pay a debt, but to deliver that which belonged to him. Under the circumstances this was not a mere "act of omission," but "an act of misfeasance." The transaction was isolated and independent of any custom or course of dealing.

The complaint alleges that the proceeds of the first note "were received by him in trust to pay the same to the plaintiff forthwith," and that the second note was delivered to him "in trust to indorse and discount or sell the same for cash, and forthwith to pay the proceeds thereof to the plaintiff." When it is a necessary inference from the facts alleged that the money was received in a fiduciary capacity, the statute does not require that they should be labeled with that name.

Since there was no agreement as to the method of transmitting the proceeds, the expectation of the plaintiff that the defendants would deposit them in their bank account and remit by check, is not important. They did not attempt to remit in any way.

While some parts of the judgment as rendered by the trial court may be subject to criticism, we have not alluded to them, because only the part that was stricken out on appeal is before us for review.

After examining the exceptions to which our attention has been called, we think that the judgment of the General Term, in so far as it modified the judgment of the Circuit, should be reversed, with costs.

PARKER, J. (dissenting). An examination of the question presented leads me to adopt the view entertained by the majority of the court at General Term. (*Moffat v. Fulton*, 31 N. Y. S. R. 154.)

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The question has been before that court, and with the same result, on other occasions. (*Hillis v. Bleckert*, 53 Hun, 499; *Bartlett v. Sartorius*, 25 N.Y. S. R. 629; *Harland v. Howard*, 32 id. 872.)

The judgment of the trial court awarded to the plaintiff \$1,789.07 and costs, and authorized its enforcement out of the joint property of the defendants, the separate property of the defendant Fulton, and against the person of Fulton.

The General Term modified the judgment by striking therefrom the words "and against the person of the said defendant Robert Fulton," on the ground that the complaint does not specifically allege that Fulton received the money in a fiduciary capacity.

The appellant insists that the requirements of the Code are met when the facts alleged warrant the conclusion that the money was received in a fiduciary capacity.

A portion of subdivision 2, section 549 of the Code of Civil Procedure forms the basis of the different views contended for.

The section, so far as pertinent to the present discussion, provides that "a defendant may be arrested in an action as provided in this title, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office or in professional employment; fraud or deceit; or to recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received or to recover property or damages for the conversion or misapplication of property where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misap-

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plied by a public officer or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker or other person in a fiduciary capacity. Where such allegation is made the plaintiff cannot recover unless he proves the same on the trial of the action, and a judgment for the defendant is not a bar to the new action to recover the money or chattel."

It will be observed that it is plainly provided that in order to bring a case within the scope of that section it must be alleged in the complaint that the money was received in a fiduciary capacity, and in determining whether it should receive a technical construction, requiring such an allegation in terms, in addition to the plain and concise statement of facts provided for by section 481 of the Code of Civil Procedure, or simply a statement of the facts, we may inquire as to the probable intent of the legislature.

Prior to the enactment of chapter 672 of the Laws of 1886, section 549 provided for cases where the arrest depended exclusively on the nature of the action, and section 550 to those where the right to arrest depended in part, at least, on facts extrinsic to the cause of action. Subdivision three of the latter section provided for a case of money received in a fiduciary capacity and misapplied. The cause of action was, *ex contractu*, the right of arrest extrinsic, and if an allegation of conversion was also made it was treated as surplusage and not issuable. (*Segelken v. Meyer*, 94 N. Y. 473-484; *Donovan v. Cornell*, 8 N. Y. Civil Pro. R. 283; *Greentree v. Rosenstock*, 61 N. Y. 583-590.)

The order of arrest could only be granted on the pleadings and affidavits, the right to it was not an issuable fact but contestable only on affidavits, and if not granted before judgment rendered, an execution against the person could not issue. (*Wood v. Henry*, 40 N. Y. 124.)

In 1886 section 550 of the Code was amended among other respects by striking out the provision relating to actions for money received in a fiduciary capacity and misapplied, and

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section 549 was amended by its incorporation into subdivision 2, but with an important change in its phraseology in that it required that an allegation to that effect should be made in the complaint and proved on the trial — if made and not proved, plaintiff to fail of recovery.

The effect of this amendment was not to change the cause of action from contract to one of tort, but to change the remedy. As we have observed prior to such amendment the right to issue an execution against the person in actions of this character, was made to depend on an application by the plaintiff for an order of arrest based on appropriate affidavits before the entry of judgment. The defendant had a right to contest such application by means of opposing affidavits, and the judge determined from such papers and the pleadings whether a proper case was presented for an order of arrest. If granted, and not subsequently vacated, execution issued against the person in the event of plaintiff's recovery. The jury were thus prevented from considering whether the circumstances entitled a plaintiff to a remedy against the person as well as the property of the defendant. Their duty was fully performed when they had determined what sum, if any, was due to the plaintiff. The court having already decided if applied to, and on other papers in part, whether the plaintiff was entitled to the additional remedy which the issuing of an order of arrest gave.

It may tend to show the purpose of the legislature if in this connection we briefly examine chapter 672 of the Laws of 1886. The first and second sections amend sections 549 and 550 of the Code of Civil Procedure, in the respects already sufficiently alluded to for our present purpose. Section 3 amends section 551 of the Code, so as to conform the practice in granting and serving orders of arrest to sections 549 and 550, as by such act amended.

Section 4 amends section 558 of the Code, so as to provide, among other things, that when the order of arrest is applied for, after the filing or service of the complaint, the court may before granting the same, direct the service of an amended

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complaint, so as to conform to the allegations required in subdivisions two and four of section 549. It may be remarked in this connection that only subdivisions 2 and 4 of section 549 provide for allegations in the complaint in addition to those requisite to establish a cause of action, and that a judgment may be recovered if they are omitted, but the remedy against the person does not in such case flow from it.

Section 5 amends or substitutes for section 3 of the Code, a section limiting the term of imprisonment in jail under an execution against the person; limiting the period which a person may be imprisoned within the jail liberties of any jail; prohibiting further imprisonment in the same action, and making it the duty of the sheriff to discharge a person imprisoned, at the expiration of the periods provided for, without any further application therefor.

Section 6 amends section 572 of the Code so as to provide for the discharge of the debtor from custody in certain cases of unwarrantable delays, the plain object of the section being to relieve the debtor from continued and extended imprisonment, whether by virtue of separate mandates in the same or different actions.

Section 7 provides that the act shall apply to all imprisoned debtors under any mandate against the person heretofore issued, and commands the sheriffs of the several counties to discharge within five days from the passage of the act all persons entitled to discharge by the provisions of section 3 of the Code of Civil Procedure as amended.

It is apparent, therefore, that the purpose of the legislature in amending the several sections of the Code of Civil Procedure in the manner provided by chapter 672 of the Laws of 1886 was in the direction of personal liberty.

Before the amendment, a person who misapplied moneys obtained in a fiduciary capacity was subject to arrest on an order granted before judgment and to be taken in execution against the person after.

The creditor still has the same remedy, but the procedure is changed. Formerly he only had to state in his pleadings a

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plain and concise statement of the facts, and on trial need prove nothing more. Whether he was entitled to an order of arrest carrying with it a right to an execution against the person of his debtor depended on the affidavits presented to the judge and his view of their sufficiency.

But now as I interpret the section under consideration in the light of the apparent intent of the legislature, as manifested by the other provisions of the act creating the order, an order of arrest cannot be obtained, unless the complaint alleges, in addition to a plain statement of the facts, that the money misapplied was obtained in a fiduciary capacity.

The plaintiff makes the allegation at his peril, for if he fails to prove it to the satisfaction of the jury, judgment must go against him in a case, when but for such allegation the jury would be required to find an indebtedness to the plaintiff, on the part of the defendant.

The object of the amendment seems to have been to give a defendant charged with misappropriating moneys received in a fiduciary capacity. 1. Specific notice that the plaintiff seeks a remedy against his person. 2. The benefit of an ordinary trial by jury, with the privilege of adducing oral testimony, and of cross-examination of adverse witnesses upon the facts, involving the right of arrest. 3. Such advantage as may accrue because of the plaintiff's knowledge that if he fail to satisfy the jury, that the facts entitle him to a remedy against the person of the defendant, judgment for costs will be rendered against the plaintiff.

It is not contended by those differing with the construction heretofore given by the courts to section 549, that it was not framed with a view to insure to a defendant appraisal by the complaint that a remedy against his person is sought. But it is urged that he may be said to be so apprised if the allegations of the complaint warrant the conclusion which the Code says must be alleged. Some of the reasons have already been given which have led me to the conclusion that the legislature intended to, and did provide for an allegation so specific as to give the defendant ample notice that he must be prepared to contest

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with the plaintiff, the facts involving the right of arrest as well as the alleged indebtedness, and it may not be amiss to call attention to the argument, which the situation of this case presents, in support of the wisdom of the legislature in providing for an allegation which insures to the defendant actual notice that a remedy beyond a judgment for money is sought.

It is now about to be held, in effect, if not in terms, that the causes of action averred in the complaint are not in tort, but *ex contractu*, because for money had and received in a fiduciary capacity (*Segelken v. Mayer*, 94 N. Y. 474-484), and that the complaint being susceptible of such a construction, the defendant must be deemed to have been notified by it that a remedy against his person was sought. Yet, in this very case, the defendant pleaded a counter-claim to which the plaintiff interposed a demurrer in which he assigned, among other grounds of demurrer, "that it appears on the face of said counter-claim that it is not of the character specified in section 501 of the Code of Civil Procedure, in that it alleges facts constituting a cause of action arising on contract, while the cause of action arising out of the facts alleged in the complaint is in tort and not on contract."

After argument, the demurrer was sustained and judgment thereon rendered in favor of the plaintiff.

Now, can it be that, a complaint which the plaintiff by his demurrer asserted was in tort, an assertion which the court after argument made sustained by its judgment, may be said to have apprised the defendant that on the trial he should be prepared to meet the charge that a recovery was claimed for money received in a fiduciary capacity? It seems to me not, and that it was to provide against just such cases that induced the legislature in part at least to require that in addition to the statement of facts, there should be a specific allegation which should with certainty inform a defendant of the extent of the remedy sought against him.

Other instances might be cited tending to show that the evident purpose of the legislature will not be effectuated, if the section of the Code under consideration be so construed as

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to render it unnecessary to aver in the complaint the allegation declared to be essential in case a remedy against the person is sought.

But it will serve no useful purpose to multiply them. The legislature clearly intended to take a further step in the direction of personal liberty; and to that end deemed it essential that a defendant should have explicit notice that other than a money judgment is claimed; that he should have the right to contest the charge of breach of trust before a jury, and to prevent the charge from being lightly made and on insufficient grounds, it imposed as a penalty for failure to substantiate the allegations required to be pleaded that the plaintiff should fail of recovery.

The judgment should be affirmed.

BRADLEY J. (dissenting). I think to justify execution against the person of a defendant it is sufficient that the inference from the allegations of the complaint is necessarily in support of a cause of action authorizing it. It is otherwise if there is opportunity for other or contrary contention. In my view such a cause of action is not necessarily the effect of the allegations of the second count. And the fact that those of the first count would alone be sufficient for it, does not warrant such final process. (*Mills v. Scherder*, 2 N. Y. 262.)

The judgment, therefore, should be affirmed.

All concur with VANN, J., except BRADLEY and PARKER, JJ., dissenting.

Judgment as modified reversed.

Statement of case.

ANTOINETTE MACAULEY, Appellant, v. ROBERT H. SMITH et al.,
Respondents.

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L. conveyed certain premises to S. T. and H. by deeds absolute on their face in pursuance of an agreement, by which she contracted to so convey as security for a loan which the grantees agreed to and did make; said loan to be for a period not exceeding one year from the date of the deed. Upon repayment of the loan with the interest the grantees agreed to reconvey; but in case it was not repaid within the year, the grantor agreed that the deed should become absolute and that the grantees, their heirs and assigns, should become the owners in fee simple absolute. The loan was not repaid within the year and thereafter the grantor surrendered possession of the premises to the grantees. Plaintiff levied upon the premises, by virtue of an attachment against L. as a non-resident, in an action wherein the summons was served by publication, obtained judgment by default, and issued execution thereon. In an action to have said deeds declared to be mortgages, and the premises subjected to the lien of the plaintiff's judgment, *held*, that plaintiff was entitled to the relief sought; that the deeds were mortgages; that the provision in the contract that if the loan was not repaid in the time specified they should become absolute conveyances, was ineffectual; that, as, therefore, the title remained in L., the lien by virtue of the attachment was valid, and the judgment and execution became a specific lien upon the land.

The grantees before the attachment was issued executed a deed of the premises to the defendant, the N. Y. B. Union. The grantee had no notice of the agreement; it admitted that a portion of the purchase-money, agreed by it to be paid, remained unpaid. *Held*, that said defendant could not maintain the defense; that it was not a *bona fide* purchase for value, as in order to sustain that relation, it must have paid all of the purchase-money; but that to the extent of its payments innocently made before notice of plaintiff's claim it was entitled to protection.

Thurber v. Blanck (50 N. Y. 80), distinguished.

(Argued April 18, 1892; decided May 3, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought to have certain conveyances of real estate by warranty deeds declared to be mortgages, and to have

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the real estate adjudged to be subject to the lien of a certain judgment recovered by the plaintiff against the grantor in such deeds, and an execution issued thereon.

The action in which the judgment was entered was for the recovery of money only, and was commenced in August, 1879, by this plaintiff against Lucilia Tracy by publication of a summons against the defendant therein as a non-resident, and an attachment was at the same time issued against her property, which was in form levied upon the real estate in question. Judgment by default was entered in that action in July, 1883, and an execution issued thereon to the sheriff of the county where the property was situated, which execution has since been held by the sheriff. On and prior to the 6th day of July, 1871, Lucilia Tracy was the owner and in possession of two parcels of real estate on Alexander street in the city of Rochester, upon one of which parcels there were two mortgages of \$5,000 and \$2,000, respectively. On the 5th day of July, 1871, she entered into an agreement in writing with the defendants Robert H. Smith and Calvin Tracy, and one Slocum Howland, since deceased (who is represented in this action by the defendants William and Emily Howland, as his executors), whereby in consideration of and for the purpose of securing a loan of \$8,240, she agreed to execute and deliver to them a good and sufficient warranty deed of both parcels of land above mentioned; and the agreement proceeds as follows: "And the said Howland, Smith and Tracy, in consideration of and before the execution and delivery of said deed, hereby agree to advance the said sum of \$8,240 (in a manner specified) to the said Lucilia Tracy. It is also hereby agreed by and between the parties hereto that the said deed is to be and is a security for said loan for a term not exceeding one year from the date of said deed; which is to be hereafter executed; and that upon the repayment of said sum of \$8,240, with interest, within or at the expiration of said one year, by the said Lucilia Tracy, her heirs, executors, administrators or assigns, the said Howland, Smith and Tracy, their and each of their heirs, executors, administrators or

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assigns, are to reconvey said premises so conveyed to said Lucilia Tracy, her heirs, executors, administrators and assigns, free from all incumbrances or liens thereon, except such as exist and are liens or incumbrances upon said premises at the time of the conveyance thereof as aforesaid by the said Lucilia Tracy." "And in case the said sum of \$8,240 shall not be repaid during or at the expiration of one year as aforesaid, then it is understood and agreed that the said deed so as aforesaid to be executed by the said Lucilia Tracy, is to become and be a deed absolute, and the said Howland, Smith and Tracy, or their heirs or assigns, are to become and be the owners thereof in fee simple absolute." On the following day, Miss Tracy executed and delivered to the other parties to the agreement deeds of the two parcels of land, containing the usual covenants of warranty, which were on the same day duly recorded in the clerk's office of Monroe county, in and by one of which deeds the grantees, as part consideration of the conveyance, assumed the payment of the two mortgages above mentioned, but did not covenant to pay them. The loan was not repaid, and in December, 1872, the grantor, who remained in possession of the premises for about two years after the date of the deeds and then quit and surrendered possession of the premises to the grantees, who remained in possession thereof, by tenants or otherwise, until the 1st of January, 1875, when they sold and conveyed the same to the defendant, the New York Baptist Union for Ministerial Education, which has ever since been in possession of the premises, claiming title thereto.

The debts for which plaintiff obtained judgment against Lucilia Tracy were contracted prior to January 1, 1872. The agreement of July 5, 1871, was never recorded, and the defendant, the Baptist Union, had no notice thereof at the time of its purchase of the property.

It was conceded on the part of the plaintiff that her judgment against the grantor in the deeds above mentioned is of no force or effect for the purposes of this action, unless as a judgment *in rem.* by virtue of a levy of the attachment upon the property in question. (Code of Civil Procedure, § 707.)

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John Van Voorhis for appellant. The transaction created the relations of mortgagor and mortgagee between *Lucilia Tracy*, and *Howland, Smith and Tracy*. (*Garnsey v. Rogers*, 47 N. Y. 293; *Conway v. Alexander*, 7 Cranch, 240; *Flagg v. Mann*, 2 Sumn. 527; *Wharf v. Howell*, 5 Binn. 503; *Glover v. Payne*, 19 Wend. 520; *Edrington v. Harper*, 3 J. M. 354; *Webb v. Paterson*, 7 Hump. 435; *Holmes v. Grant*, 8 Paige, 257; *Ross v. Norvell*, 1 Wash. 40; *Thompson v. Davenport*, Id. 125; *Bennett v. Holt*, 2 Yerg. 6; *Horn v. Ketellas*, 46 N. Y. 605; *Morris v. Budlong*, 78 id. 543; *Kraemer v. Adlesberger*, 122 id. 467; *Randall v. Sanders*, 87 id. 578; *Howard v. Hams*, 1 Vern. 190; *James v. Oades*, 2 id. 402; *Newcomb v. Bonham*, 1 id. 7; *Remsen v. Hay*, 2 Edw. Ch. 585; *Brown v. Gaffray*, 28 N. Y. 149; *Shattuck v. Bascom*, 105 id. 46.) The deeds constituting a mortgage, the title remained in *Lucilia Tracy*. (*Barry v. H. B. F. Ins. Co.*, 110 N. Y. 1; *Thorn v. Sutherland*, 123 id. 236; *Pom. Eq. Juris*. § 73.) The plaintiff's attachment was properly levied upon this land. Her judgment, which followed the attachment, became a specific lien upon the land. The land could be sold upon the execution and the purchaser could redeem. (*Stonehewer v. Thompson*, 2 Atk. 440; *Neate v. Duke of Marlborough*, 3 My. & Cr. 407; *Jeffreys v. Dixon*, L. R. [1 Ch.] 183; *Mildred v. Austin*, L. R. [8 Eq.] 226; *In re Cowbridge R. Co.*, 5 id. 413; *Guest v. Cowbridge R. Co.*, 6 id. 619; *Thornton v. Finch*, 4 Giff. 505; *Beck v. Burdett*, 1 Paige, 305; *Heyd v. Bolles*, 33 How. Pr. 266; *Skinner v. Stuart*, 13 Abb. Pr. 442; *Rinchey v. Stryker*, 28 N. Y. 45; *Frost v. Matt*, 34 id. 253; *Adsit v. Butler*, 87 id. 585; *Dulevy v. Tallmadge*, 32 id. 457; *Scythe Co. v. Foster*, 36 id. 561; *Bowe v. Arnold*, 31 Hun, 256; 101 N. Y. 652; *McIvain v. Willis*, 5 Wend. 561.) A mortgagee in possession is a trustee for the mortgagor. (*Kane v. Bloodgood*, 7 Johns. Ch. 111; *Hunt v. Maynard*, 6 Pick. 491; *Jenkins v. Jones*, 2 Giff. 108; *Perry on Trusts*, § 243; *Code Civ. Pro.* § 379.) The defendant, the New York Baptist Union for Ministerial Education, is not a *bona fide* purchaser. (*Sargent v. E. S. Co.*, 46 Hun, 19; *Boone v. Chiles*, 10 Pet. 179;

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Thomas v. Stone, Walk. Ch. 117; *McBee v. Loftus*, 1 Strohb. Eq. Rep. 90; *Harris v. Norton*, 16 Barb. 264; *Story v. Lord Windsor*, 2 Atk. 630; *Hardingham v. Nicholls*, 3 id. 304; *Doswell v. Buchanan*, 3 Leigh, 365; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Paul v. Fulton*, 25 Mo. 156; *Wormly v. Wormly*, 8 Wheat. 449; *Dugan v. Vattier*, 3 Blackf. 245; *Lewis v. Phillips*, 17 Ind. 108; *Patten v. Moore*, 32 N. H. 382; *Blanchard v. Tyler*, 12 Mich. 339; *Palmer v. Williams*, 24 Mich. 328; *Hunter v. Shirrall*, 5 Litt. 62; *Tourville v. Naish*, 3 P. Wms. 306; *Jones v. Stanly*, 2 Eq. Cas. 685; *Merritt v. N. R. R. Co.*, 12 Barb. 605; *Jackson v. Cadwell* 1 Cow. 622; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Swayze v. Burke*, 12 Pet. 11; *Matson v. Heirs*, 42 Mich. 473; *Campbell v. Roach*, 45 Ala. 667; *Perry on Trusts*, §§ 219, 221; 2 Pom. Eq. Juris. 750; *Clements v. Moore*, 6 Wall. 299; *Holme v. Karsper*, 5 Bing. 469; *Clifton v. Sheldon*, 23 How. Pr. 481; *Vallett v. Parker*, 6 Wend. 615.) The defense of a former adjudication is not available. (*Dawley v. Brown*, 79 N. Y. 390.) No point can be made on the erasure of the signatures. (*Trull v. Skinner*, 17 Pick. 213; *Patterson v. Yeaton*, 47 Maine, 308; *Ford v. Olden*, L. R. [3 Eq. Cas.] 461; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; 2 Washb. on Real Prop. 63, 119; *Russell v. Southard*, 12 How. Pr. 139, 154; *Villa v. Rodriguez*, 12 Wall. 323; *Morris v. Nixon*, 1 How. Pr. 118; *Platt v. McClure*, 3 Woodb. & M. 151; *Hyndman v. Hyndman*, 19 Verm. 9; *McKinstry v. Conly*, 12 Ala. 678; *Hicks v. Hicks*, 5 G. & J. 75; *Scheckell v. Hopkins*, 2 Md. Ch. 89; *Wynkoop v. Cowing*, 21 Ill. 570; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Brown v. Gaffney*, 28 Ill. 149; *Lockes v. Palmer*, 26 Ala. 312; *Baughner v. Meyryman*, 32 Md. 185; *Mills v. Mills*, 26 Conn. 213; *C. C. Bank v. Risley*, 19 N. Y. 575.)

Rollin Tracy for respondents. The property sought to be reached and applied, by this action in equity, upon the attachment judgment, is such as can be reached only by the aid and instrumentality of a court of equity, and, therefore, constitutes what is denominated equitable assets. (Story's Eq. Juris.

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§ 552; Willard's Eq. Juris. 562; *Blank v. Thurber*, 50 N. Y. 80.) No lien is effected upon equitable assets, either real or personal, by virtue of an attachment levied thereon in an action wherein the debtor is a non-resident, and service of the summons was made without the state or by publication, pursuant to an order for that purpose, and the debtor has not appeared; nor will a judgment entered by default in such action become a lien upon such assets; nor will a court of equity, by means of a creditor's bill based on such attachment and judgment, acquire jurisdiction of equitable assets or entertain an action to reach and apply the same in aid of the attachment or in satisfaction of the judgment. (*Gibbs v. Q. Ins. Co.*, 63 N. Y. 125; *Shephard v. Wright*, 113 id. 582; *Penoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 id. 185; Code Civ. Pro. §§ 635, 645, 646, 647, 649, 650, 707; *Rinchy v. Stryker*, 28 N. Y. 45; *Lawrence v. Bank of Republic*, 35 id. 320; *Thurber v. Blank*, 50 id. 80; *Bowe v. Arnold*, 38 Hun, 256; 101 N. Y. 652; *Dunlevy v. Tallmadge*, 32 id. 457; *Scythe Co. v. Forster*, 36 id. 561; *Sturges v. Vanderbilt*, 73 id. 384; *Castle v. Lewis*, 78 id. 131; *Bills v. Bank*, 89 id. 343; *Gibson v. Bank*, 98 id. 87; *Adsit v. Butler*, 87 id. 590.) The deeds to Howland, Smith and Tracy conveyed the absolute title in fee in the premises conveyed, and Lucilia Tracy had no interest, equitable or otherwise, in the premises at the time of the attempted levy under the attachment, and has since had no interest therein, and for that reason the action was properly dismissed. (Jones on Mort. [3d ed.] §§ 260, 261, 267, 269, 270, 272, 338, 339; *Glover v. Payn*, 19 Wend. 519; *Matthews v. Shehan*, 69 N. Y. 591; *Macaulay v. Porter*, 71 id. 173; *Randall v. Sanders*, 87 id. 578; *Kramer v. Adelsberger*, 122 id. 476; *Macaulay v. Smith*, 10 N. Y. Supp. 578; Code Civ. Pro. § 1337; *Verplank v. Member*, 74 N. Y. 620; *Bird v. Meyer*, 113 id. 567.) The New York Baptist Union for Ministerial Education, having no notice of the agreement, took the title in fee of the premises, whether the original transaction constituted a sale or an equitable mortgage. (*Stoddard v. Rotton*, 5 Bosw. 378; *Hogarty v. Lynch*, 6 id. 144; *Tar-*

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bell v. West, 86 N. Y. 280; Code Civ. Pro. § 1337; *Verplanck v. Messeler*, 74 N. Y. 620; *Bird v. Mayer*, 113 id. 567; 3 Wait's Act. & Def. 474; Wait on Fraud. Conv. [2d ed.] §§ 386, 631; *Barnard v. Campbell*, 65 Barb. 286; 55 N. Y. 450; 58 id. 73; *Viele v. Judson*, 15 Hun, 328; *Jackson v. Bartlett*, 10 Johns. 195.)

LANDON, J. The agreement which antedated the deeds by one day and expressed their intent and purpose should be read in connection with them. Thus read, the deeds are shown to have been given by Lucilia Tracy to Howland, Smith and Tracy "for the purpose of securing and in consideration of said loan of \$8,240" made by the grantees to the grantor and "that the said deed * * * is a security for said loan for a term not exceeding one year from the date of said deed * * * and that upon the repayment of said sum of \$8,240, with interest within or at the expiration of one year by the said Lucilia * * * the said Howland, Smith and Tracy are to reconvey said premises to said Lucilia, * * * and in case said sum of \$8,240 shall not be repaid during or at the expiration of one year as aforesaid, then it is understood and agreed that the said deed * * * is to become and be a deed absolute, and the said Howland, Smith and Tracy are to become and be the owners in fee simple absolute."

The deeds are thus clearly shown to have been intended as mortgages. This conclusion is also inferable from the facts. The premises at the date of the deeds were worth \$30,000. The judgments against the premises were by the terms of the agreement to be paid from the money loaned, and presumably were either paid or their amount retained by the grantees from the \$8,240. The amount of the outstanding mortgages against the premises was \$7,000. It is not presumable that Lucilia Tracy intended to sell property worth \$30,000 for \$15,240. The grantor remained in possession of the premises for about two years after the delivery of the deeds. She was embarrassed and straightened for money. Stress is laid by the defendants upon the fact that the grantor did not expressly

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covenant to repay the money. The cases are to the effect that this is one of several circumstances to be considered (*Horn v. Keteltas*, 46 N. Y. 605; *Morris v. Budlong*, 78 id. 552; *Brown v. Dewey*, 1 Sand. Ch. 57), and here it is to be considered in connection with the repeated statement that the money to be advanced by the grantees is a loan and that "said deed is a security for said loan for a term of not exceeding one year," and that upon repayment the grantees should reconvey to the grantor. It is plain that repayment of the loan was contemplated; nothing is said of the repayment of purchase money, and there is nothing in the agreement indicating that the money advanced by the grantees was purchase-money, except that in case said sum of \$8,240 (previously termed a loan), should not be repaid at the expiration of one year, "then it is understood and agreed that the said deed is to become and be a deed absolute," thus clearly indicating that at the date of the transaction said sum was not purchase-money and said deed was not a deed absolute, but was to become so in case of non-payment of the loan. Clearly upon the undisputed facts the deeds were a mortgage to secure the money loaned, and the trial court erred in refusing the plaintiff's request so to find. The agreement that the non-payment of the loan within the time specified should convert the mortgage into an absolute deed did not have that effect. The agreement to turn a mortgage into an absolute deed in case of default is one that finds no favor in equity. The maxim "once a mortgage always a mortgage" governs the case. (*Horn v. Keteltas*, *supra*; *Murray v. Walker*, 31 N. Y. 400; *Carr v. Carr*, 52 id. 251; *Remsen v. Hay*, 2 Edw. Ch. 535; *Clark v. Henry*, 2 Cow. 324; *Morris v. Nixon*, 1 How. [U. S.] 118; *Villa v. Rodriguez*, 12 Wall. 323; 4 Kent's Com. 143.) Since the deeds were a mortgage the title did not pass to the grantees but remained in Lucilia Tracy. (*Barry v. Hamburg B. Fire Ins. Co.*, 110 N. Y. 1; *Thorn v. Sutherland*, 123 id. 236; *Shattuck v. Bascom*, 105 id. 39.)

The levy under the plaintiff's attachment was, therefore, upon Mrs. Tracy's land to which she had the legal title. It

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was not merely an attempted levy upon her equitable right to obtain title. As against Howland, Smith and Tracy the levy was valid and the judgment and execution which followed the attachment became a specific lien upon the land itself, and the land could be sold upon execution.

Howland, Smith and Tracy conveyed the premises before the attachment was issued to the defendant, the N. Y. Baptist Union for Ministerial Education. This defendant by its answer admits that \$3,000 of the purchase-money, with interest from January 1, 1883, remains unpaid, and that \$1,550 of the principal of one of the mortgages upon the premises given by Mrs. Tracy also remains unpaid. This defendant in order to maintain the defense that it is a *bona fide* purchaser without notice of plaintiff's rights, must have paid all the purchase-money. (*Sargent v. Eureka S. A. Co.*, 46 Hun, 19; *Harris v. Norton*, 16 Barb. 264; *Jewett v. Palmer*, 7 Johns. Ch. 61; *Jackson ex dem. v. Cadwell*, 1 Cow. 622; *Boone v. Chiles*, 10 Peters, 179; *Patten v. Moore*, 32 N. H. 382.)

In equity it has not completed its purchase, but to the extent of its payments innocently made before notice of plaintiff's claim is entitled to protection. It may, therefore, retire from the transaction without actual loss and without further impairing the rights of the plaintiff.

The action is in aid of plaintiff's execution. Its object is not to reach any equitable assets of Mrs. Tracy, but to strip from her legal title to the premises in question the obstructions created by the deed by which such title, apparently but not in fact, passed from her to Howland, Smith and Tracy, and from them to the Baptist Union, and thus to show that the lien acquired by plaintiff's attachment of the premises and perfected by her judgment and execution was valid, and, therefore, may now be enforced free from the obstructions which seemed to defeat it. Such an action is within the equitable jurisdiction of the court. (*Beck v. Burdett*, 1 Paige, 305; *Heye v. Bolles*, 33 How. Pr. 266; *Rinchey v. Stryker*, 28 N. Y. 45; *Frost v. Mott*, 34 id. 253.) *Thurber v. Blanck* (50 N. Y. 80) does not hold otherwise, but does hold that the attach-

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ment to be effective must operate upon legal rights; the precise position of the plaintiff here.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

EZRA B. HAYDEN, Respondent, v. THE STATE OF NEW YORK,
Appellant.

To make a legal and permanent appropriation by the State, of land or water for the use of a canal, the quantity must be definitely ascertained and described so that the owner may know how much has been taken and what he is entitled to be compensated for.

In 1867, the canal board passed a resolution, by its terms approving a map for the permanent appropriation "of the Port Byron water power on the Owasco outlet for the feeder to the Erie canal," and declaring that "the water and lands necessary for said feeder are hereby permanently appropriated." The owners of the water power filed their claim for damages, and, in 1870, while it was pending, the canal board passed a resolution defining the quantity of water intended to be taken by the former resolution, by which it was fixed at a certain number of cubic feet per minute, not the whole stream. In 1871, an award was made to the owners, which was paid. In 1879, the state appropriated all the water in the race-way. Upon a claim of damages for this appropriation, *held*, that the resolution of 1867 was too indefinite to effect a legal appropriation, and was void; that the state officers, therefore, had power by subsequent action to make an appropriation of a limited quantity of water; and that the payment for this limited appropriation did not defeat the claim for the residue when it was taken.

In 1869, before trial of the first claim, the canal appraisers made a report to the legislature to the effect that the appropriation was of the entire water power. *Held*, that as the claimant was not a party to it, the report was not binding upon him.

(Argued April 21, 1892; decided May 6, 1892.)

APPEAL from an award and order of the Court of Claims, made December 19, 1889.

The claimant was awarded for land taken	\$21 49
For water.....	1, 000 00
Total	<u>\$1, 021 49</u>

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The state concedes its liability for the land taken.

Further facts are stated in the opinion.

S. W. Rosendale, Attorney-General, for appellant. The state, by virtue of the resolution of the canal board adopted in 1867, and the appropriation made thereunder, became entitled to the use of the entire water of Owasco lake and outlet. (1 R. S. [8th ed.] 717, 732, §§ 16, 18; *Shaver v. Eldred*, 114 N. Y. 236; *S. M. Co. v. State*, 104 id. 562; *Sweet v. City of Syracuse*, 129 id. 316; *Gardner v. City of Newburgh*, 2 Johns. Ch. 161; *Smith v. City of Rochester*, 92 N. Y. 463; *Burbank v. Fay*, 65 id. 57; *Whitney v. State*, 96 id. 240; 1 R. S. [8th ed.] 738, 748, § 90.) The canal board, by the resolution of March 4, 1870, could not affect, define or limit the extent of the appropriation made in June, 1867. (*People ex rel. v. Canal Appraisers*, 9 Barb. 496; *People ex rel. v. Schuyler*, 69 N. Y. 242; *St. V. Asylum v. Troy*, 76 id. 108; *People v. Gardner*, 24 id. 583; *Delafield v. State of Illinois*, 26 Wend. 192; *State v. Hastings*, 10 Wis. 525; *Landers v. F. M. E. Church*, 97 N. Y. 119-124; *Dickinson v. City of Poughkeepsie*, 75 id. 65; *Donovan v. Mayor, etc.*, 33 id. 291; *Craighead v. Peterson*, 72 id. 279; *People v. Supervisors*, 52 id. 556-563; Laws of 1877, chap. 369; Laws of 1890, chap. 314; Laws of 1891, chap. 291; *People ex rel. v. Dayton*, 55 N. Y. 367; *In re M. S. Inst.*, 82 id. 142.) The court has the power to modify the award made herein. (Laws of 1887, chap. 507, § 10; *Sayre v. State*, 123 N. Y. 291.)

H. V. Howland for respondent.

FOLLETT, Ch. J. May 14, 1866, the state temporarily appropriated the water of Owasco lake and the Oriskany creek, under this resolution :

“*Resolved*, That the canal commissioners in charge of the middle and eastern divisions would not only be justified, but in view of the past and present scarcity of water on the Port Byron and eastern portion of the long levels of the Erie canal,

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it is their duty to make a *temporary* appropriation of the waters of the Owasco lake and the Oriskany creek, as provided by the statute."

A claim for the damages under this appropriation was filed, but no appraisalment was made, and the damages were afterwards included in the claim filed after the adoption of the resolution of June 19, 1867.

June 19, 1867, the state permanently appropriated the Port Byron water power on the Owasco outlet, pursuant to the following resolution :

" *Resolved*, That the map for the *permanent* appropriation of the Port Byron water power on the Owasco outlet for the feeder to the Erie canal, this day submitted by the state engineer and surveyor, is hereby approved and the water and lands necessary for said feeder are hereby *permanently* appropriated."

November 9, 1867, the Haydens filed their claim for compensation for the permanent appropriation of the waters of Owasco creek. March 4, 1870, while the foregoing claim was pending and before it was tried, resolutions were adopted by the canal board defining the quantity of water intended by the resolution of June 19, 1867, to be permanently appropriated, by which it was fixed at 3,600 cubic feet per minute, and not of the whole stream. The following is a copy of the resolutions of March 7, 1870 :

" *Resolved*, That the map for the permanent appropriation of the Port Byron water power on the Owasco outlet for a feeder to the Erie canal, this day submitted by the state engineer and surveyor, is hereby approved and the water and lands necessary for said feeder are hereby permanently appropriated ; and whereas, doubts have arisen as to the extent of such appropriation, therefore,

" *Resolved*, That the water and lands appropriated or intended to be appropriated by this board, was and is the water known as the Beach Mill water power, then claimed by the Bank of Auburn, being equal to power for ten run of stone and machinery, or equal to a flow of 3,600 cubic feet per

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minute under the head of 27 feet, with the right and power to keep in repair the 'Parks dam,' so-called, at the head of the race-way, also the race-way known as the Beach race-way, with the rights and privileges that the said Bank of Auburn had and acquired under said Beach, also the land necessary and as described or delineated on said map to convey the water to the canal from the end of said Beach race-way."

In June and July, 1870, evidence in *Hayden's* case was taken before the appraisers. March 11, 1871, the appraisers awarded him, as stated by the findings, \$6,301.23, but as stated by the evidence, he was awarded \$6,651.23.

November 17, 1871, the canal board increased the award to \$8,183.74, which was paid. February 15, 1879, the state appropriated 368-1000 of an acre and all the water in the race-way crossing it, under which appropriation this claim for damages was filed June 23, 1879. January 4, 1882, the canal appraisers awarded \$21.49 for the land taken, but nothing for the water. The claimant appealed and his appeal was heard before the Board of Claims, where, January 14, 1886, the award was reversed and a rehearing ordered. On the retrial the award now appealed from was made. The only question in this case is whether, under the permanent appropriation of June 19, 1866, the state acquired all of the water of Owasco creek. If it did the allowance of \$1,000 is wrong; if it did not, it is right.

The attorney-general contends that the state permanently appropriated all of the water of the Owasco outlet by the resolution of June 19, 1867, and that the canal board had no power by the subsequent resolutions of March 4, 1870, to limit the quantity of water taken to "3,600 cubic feet per minute under the head of 27 feet," though the resolution was passed before the damages were assessed. To make a legal and permanent appropriation of land or water for the use of a canal the quantity must be definitely ascertained and described, so that the owner may know how much he has lost and what he is entitled to be compensated for. If the water to be appropriated is described as *all* in a certain lake or all flowing in a particular

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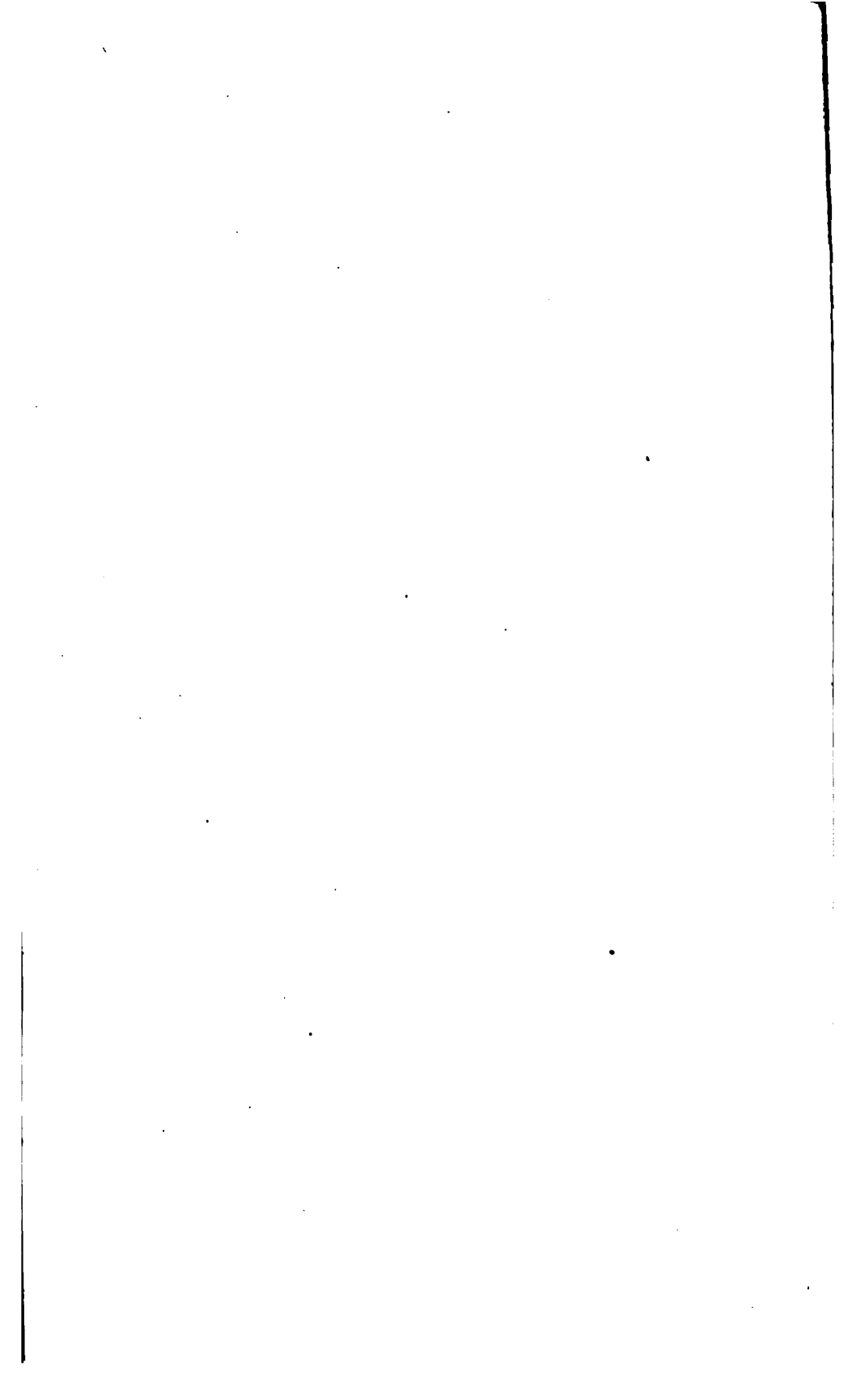
stream, such would undoubtedly be a sufficiently definite description. But in this case the resolution did not state that *all* of the water of the outlet, or that any particular quantity or part of it was appropriated, and the description was too indefinite to effect a legal appropriation. The original attempt to appropriate not being effective, the officers of the state had power by subsequent action to make a definite and permanent appropriation of a given quantity of water. Under this limited appropriation the claimant's damages were ascertained and paid, and it would be inequitable to allow the state to successfully assert that the award was for all of the water instead of for 3,600 cubic feet per minute. The report of the canal appraisers (Senate Doc. No. 56), made in 1869, to the effect that the appropriation was of the entire water power, was made before the claim filed November 9, 1869, was tried, the claimant was not a party to it and it is not binding on him.

The Board of Claims well decided, on sufficient legal evidence, that the state had not, prior to the appropriation of February 15, 1879, taken all of the water from the stream.

The order and award should be affirmed, with costs.

All concur,

Award affirmed.



MEMORANDA

OF

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

EDWARD KELLY, Appellant, *v.* JAMES C. BROWER,
Respondent.

(Argued January 21, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 10, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to recover back an installment paid upon contracts for the purchase of real estate. Plaintiff declined to take a conveyance because of an alleged failure of title in defendant to a strip of the land described in the contracts.

The court, after a consideration of the various deeds, maps and surveys, reached the conclusion that defendant's title covered, and that he was the owner in fee of the strip in question.

Joseph A. Burr for appellant.

William T. Gilbert for respondent.

BRADLEY, J., reads for affirmance.

All concur.

Judgment affirmed. _____

JAMES BROWN, Respondent, *v.* THE HARTFORD FIRE INSURANCE COMPANY, Appellant.

(Argued January 26, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order

made April 30, 1889, which affirmed a judgment in favor of plaintiff and affirmed an order denying a motion for a new trial.

A. H. Sawyer for appellant.

D. F. Searle for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

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NELLIE L. DEXTER, Appellant, v. EDWARD DEXTER,
Respondent.

(Argued January 27, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made at the February term, 1889, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit.

Alex. Thain for appellant.

Jacob F. Miller for respondent.

Agree to affirm ; no opinion.

All concur, except BRADLEY, J., not voting.

Judgment affirmed.

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MYRA L. WADSWORTH, Respondent, v. THE JEWELERS AND
TRADESMEN'S COMPANY of New York, Appellant.

Where a policy of life insurance contains a promise to pay a certain specified sum, and this is followed by obscure clauses, difficult to be understood or requiring expert knowledge for their comprehension, they will not be construed as intended to impair the promise, but should receive the construction the insurer had reason to suppose was put upon them by the insured. To effect an impairment of the original obligation, the language of the subsequent clauses must be clear and unambiguous.

Reported below, 26 J. & S. 88.

(Argued January 28, 1892; decided February 12, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The following is the opinion in full :

"The plaintiff seeks to recover upon a certificate of insurance issued by the defendant upon the life of Elbert E. Wadsworth, her late husband, for her benefit. The only question presented by this appeal is as to the amount payable to the plaintiff under the contract of insurance.

"The defendant is a mutual benefit association incorporated in 1886 under chapter 175, Laws of 1883. It issued its certificate of membership, or policy of insurance to the plaintiff's husband, which, after preliminary recitals, declared 'There shall be payable to Myra L. Wadsworth, \$4,000 from the death fund of the company at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment as hereinafter set forth, and no claim shall be otherwise due or payable except from the reserve fund as hereinafter provided.'

"It will be observed that there is no plain suggestion in this provision that the amount payable is in any way liable to be lessened; it is to be paid, all of it, 'from the death fund of the company at the time of said death,' but lest that fund at that time may not be large enough, the further provision is added, obviously to supply the deficiency, 'or from any moneys that shall be realized to the said fund from the next assessment to be made as hereinafter set forth.'

"The final clause of the promise, 'and no claim shall be otherwise due or payable except from the reserve fund as hereinafter provided,' gives notice that there is also a reserve fund to which recourse may be had. The insured, reading the entire provision, would probably regard it as immaterial to him whether payment should be made from one fund or another, but would remark with satisfaction that three sources for payment were provided.

"The trial court awarded the plaintiff all the moneys in the death fund at the time of the death of her husband, namely, \$1,798.35, and also all that were 'realized to the said fund

from the next assessment,' namely, \$1,749.07, being eighty per centum of the total assessment. The aggregate of both sums fell short of \$4,000. There was no reserve fund applicable to the payment, and the plaintiff has, therefore, recovered less than the amount apparently promised her. The defendant opposes the construction we have given to the promissory parts of the contract, and claims that the plaintiff was only entitled to the amount in the death fund at the date of the death, or to the amount 'realized to that fund from the next assessment,' and not to both amounts.

"The whole contract consists not only of the certificate of membership, but of the application for membership, and the constitution and by-laws of the defendant — quite a volume of matter, requiring careful attention, and possibly skill for a complete understanding of the precise contractual relations of the insurer and the insured.

"But the other provisions of these instruments seem to harmonize with the construction we have adopted.

"The policy of insurance further provides: 'If * * * the death fund is insufficient to meet existing claims by death, an assessment shall then be made upon every member * * * at the date of the last death assessed for,' and eighty per cent of the net proceeds thereof 'shall go into the death fund.' Section 2, article 5 of the constitution provides that the death fund 'shall be used only for the payment of death claims,' and also prescribes details of assessment. Section 1, article 8 of the constitution requires payment to be made to the beneficiaries of the amount 'to which the same are entitled according to the terms of the certificate of membership.' Section 8 of article 9 provides that 'so long as sufficient money is in the death or mortuary fund to pay existing claims, no assessment will be made,' thus implying that if it is not sufficient, an assessment will be made to make it so.

"There is nothing in the constitution to cut down the amount promised to the beneficiary, unless it is section 3 of article 5 of the constitution, as follows: 'In case a death claim is proven while a single assessment is insufficient to pay the said claim in full, there shall be paid in full satisfaction of

such claim, a sum *pro rata* of the membership and benefits in force at the time of the death of such member.'

"This provision is obscure — it probably means that a single assessment is expected to be large enough to pay any death claim in full, but as it may not be, then such additions must be made to it as shall increase it to a 'sum *pro rata* of the membership and benefits in force.'

"We suppose this obscure expression is intended as the equivalent of the methods of replenishing the death fund elsewhere provided for, and not as a provision for its abatement. If intended as an impairment of the obligation to pay in full, or at least to pay such less sum as is already in the death fund at the date of the death of the insured, with the proceeds of the next assessment applicable and added thereto, such intent is not expressed with sufficient certainty to be effective.

"If this policy is so framed as to promise a payment of \$4,000, and then to impair the promise by the introduction of subsequent and obscure clauses difficult to be understood or requiring expert knowledge for their comprehension, we should adopt that construction which we think the insurer had reason to suppose was understood by the insured. (*Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405.)

"The defendant lays stress upon the proposition that if the death fund and an assessment shall both be exhausted in paying this claim, injustice will be done to the surviving members, since, upon the next death, no death fund will exist to which a like assessment can be added. It seems that the plaintiff's husband was the first of the members of this association to die.

"The death fund is created from initiation fees, annual dues and assessments. If no death should soon occur, it is obvious that this objection might prove invalid. However that may be, the objection goes to the practical wisdom of the defendant's scheme of insurance, rather than to the plaintiff's legal rights.

"It also appears that the deceased was one of the charter members and paid with his associates what was termed the 'first assessment,' in addition to the fixed dues for admission. If they thus voluntarily created a small death fund in advance,

... v. THOMAS H. GROVES,
...ellant.

(decided March 8, 1892.)

...gment of the General Term of the Supreme
 ... judicial department, entered upon an order
 ... 25, 1890, which affirmed a judgment in favor of
 ...ntered upon the report of a referee.

...an D. Lynn for appellant.

Isaac S. Signor for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE RELIABLE STEAM POWER COMPANY, Respondent, *v.* THE
 SOLIDARITY WATCH CASE COMPANY, Appellant.

(Argued February 1, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City
 Court of Brooklyn, entered upon an order made June 23, 1890,
 which affirmed a judgment in favor of plaintiff entered upon
 a verdict directed by the court, and also affirmed an order deny-
 ing a motion for a new trial.

Charles H. Machin for appellant.

Joshua M. Van Cott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

it is probable that they did so in view of the contingency that a death claim might arise while the company was too weak to meet it in the usual course of its business.

"The plaintiff being within the contingency thus in part provided for, may justly claim the benefit of the provision.

"The judgment should be affirmed, with costs."

James M. Hunt for appellant.

S. F. Kneeland for respondent.

LONDON, J., reads for affirmance.

All concur.

Judgment affirmed. _____

TRUE D. MATSON, Appellant, v. JUSTIN BLOSSOM, Respondent.

(Argued January 22, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

William E. Hobby for appellant.

John Desmond for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM GARLOCK, Appellant, v. SAMUEL W. MARKHAM,
Respondent.

(Argued January 25, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

J. S. Garlock for appellant.

John Desmond for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ALLEN D. BRIGGS, Respondent, *v.* THOMAS H. GROVES,
Appellant.

(Argued January 29, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

John D. Lynn for appellant.

Isaac S. Signor for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE RELIABLE STEAM POWER COMPANY, Respondent, *v.* THE
SOLIDARITY WATCH CASE COMPANY, Appellant.

(Argued February 1, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Charles H. Machin for appellant.

Joshua M. Van Cott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

it is probable that they did so in view of the contingency that a death claim might arise while the company was too weak to meet it in the usual course of its business.

"The plaintiff being within the contingency thus in part provided for, may justly claim the benefit of the provision.

"The judgment should be affirmed, with costs."

James M. Hunt for appellant.

S. F. Kneeland for respondent.

LONDON, J., reads for affirmance.

All concur.

Judgment affirmed. _____

TRUE D. MATSON, Appellant, v. JUSTIN BLOSSOM, Respondent.

(Argued January 22, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

William E. Hobby for appellant.

John Desmond for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM GARLOCK, Appellant, v. SAMUEL W. MARKHAM,
Respondent.

(Argued January 25, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

J. S. Garlock for appellant.

John Desmond for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ALLEN D. BRIGGS, Respondent, *v.* THOMAS H. GROVES,
Appellant.

(Argued January 29, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

John D. Lynn for appellant.

Isaac S. Signor for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE RELIABLE STEAM POWER COMPANY, Respondent, *v.* THE
SOLIDARITY WATCH CASE COMPANY, Appellant.

(Argued February 1, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Charles H. Machin for appellant.

Joshua M. Van Cott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

it is probable that they did so in view of the contingency that a death claim might arise while the company was too weak to meet it in the usual course of its business.

"The plaintiff being within the contingency thus in part provided for, may justly claim the benefit of the provision.

"The judgment should be affirmed, with costs."

James M. Hunt for appellant.

S. F. Kneeland for respondent.

LONDON, J., reads for affirmance.

All concur.

Judgment affirmed. _____

TRUE D. MATSON, Appellant, v. JUSTIN BLOSSOM, Respondent.

(Argued January 22, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

William E. Hobby for appellant.

John Desmond for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM GARLOCK, Appellant, v. SAMUEL W. MARKHAM,
Respondent.

(Argued January 25, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

J. S. Garlock for appellant.

John Desmond for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ALLEN D. BRIGGS, Respondent, *v.* THOMAS H. GROVES,
Appellant.

(Argued January 29, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

John D. Lynn for appellant.

Isaac S. Signor for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE RELIABLE STEAM POWER COMPANY, Respondent, *v.* THE
SOLIDARITY WATCH CASE COMPANY, Appellant.

(Argued February 1, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Charles H. Machin for appellant.

Joshua M. Van Cott for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

it is probable that they did so in view of the contingency that a death claim might arise while the company was too weak to meet it in the usual course of its business.

"The plaintiff being within the contingency thus in part provided for, may justly claim the benefit of the provision.

"The judgment should be affirmed, with costs."

James M. Hunt for appellant.

S. F. Kneeland for respondent.

LONDON, J., reads for affirmance.

All concur.

Judgment affirmed. _____

TRUE D. MATSON, Appellant, *v.* JUSTIN BLOSSOM, Respondent.

(Argued January 22, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

William E. Hobby for appellant.

John Desmond for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

WILLIAM GARLOCK, Appellant, *v.* SAMUEL W. MARKHAM,
Respondent.

(Argued January 25, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

J. S. Garlock for appellant.

John Desmond for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ALLEN D. BRIGGS, Respondent, *v.* THOMAS H. GROVES,
Appellant.

(Argued January 29, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 25, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

John D. Lynn for appellant.

Isaac S. Signor for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THE RELIABLE STEAM POWER COMPANY, Respondent, *v.* THE
SOLIDARITY WATCH CASE COMPANY, Appellant.

(Argued February 1, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Charles H. Machin for appellant.

Joshua M. Van Cott for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ROBERT MACDONALD et al., Appellants, v. ANNA WALLSTEIN
et al., Respondents.

(Argued February 2, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and also affirmed an order denying a motion for a new trial.

Blumensteil & Hirsch for appellants.

Benno Loewy for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ROXANNA KELLEY, Appellant, v. ANN AUGUSTA FOSTER et al.,
Impleaded, etc., Respondents.

(Argued February 2, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 23, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This was an action for an accounting by defendants, as administrators of Francis E. Foster, who, at the time of his decease, was acting as liquidator of the Croton River National Bank, which had gone into voluntary liquidation.

The only questions presented were of fact as to certain counter-claims allowed by the referee appointed to take the account.

W. A. Abbott for appellant.

Calvin Frost for respondents.

HAIGHT, J., reads for affirmance of judgment.

All concur.

Judgment affirmed. _____

CHARLES H. ARTHUR et al., Appellants, v. ALFRED P. WRIGHT
et al., Respondents.

(Submitted February 2, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Circuit, and denied a motion for a new trial.

H. C. Day for appellants.

Frank Brundage for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

MARY A. STRYKER, Appellant, v. FRANCIS M. SCHUYLER,
Respondent.

(Submitted February 3, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1889, which affirmed a judgment in favor of defendant entered upon the report of a referee.

William H. Henderson for appellant.

John Woodward for respondent.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

JACOB SALLADE, Respondent, v. CHARLES A. GERLACH,
Impleaded, etc., Appellant.

In an action upon a promissory note indorsed by defendant G., he answered to the effect that he held the legal title to certain letters patent owned by H., in order to effect a sale thereof for H.; that he sold an interest therein to the maker of the note, which was given in part payment; that at the request of H. the note was made payable to and was indorsed by G., in order simply to show that he had properly discharged the trust, and that the note was afterwards wrongfully diverted by H. The latter died before the trial. Upon the trial G. as a witness in his own behalf, was asked how it happened that the note was made payable to his order. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 828). *Held*, no error.
Denise v. Denise (110 N. Y. 562), distinguished.

(Argued February 2, 1892; decided March 8, 1892.)

APPEAL by defendant Gerlach from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 1, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was upon a promissory note, payable four months after date, for \$1,250, made by the defendant Phillips to the order of the defendant Gerlach, and indorsed by the defendants Gerlach and Herdic, of which the plaintiff was the owner.

The answer of the defendant Gerlach is to the effect that he held the legal title to certain rights in letters patent owned by Herdic in order to effect the sale thereof for Herdic, and having sold the right to use the same in Buffalo to Phillips, Phillips gave this note in part payment thereof, and, at the request of Herdic, the note was made payable to the order of Gerlach, and indorsed by him in order to show that he had properly discharged his trust respecting it in favor of Herdic, and not for the purpose of becoming guarantor of the note, and that Herdic afterwards wrongfully diverted the note.

The following is the opinion in full :

"The only question presented by the appellant upon this appeal is with respect to the ruling of the trial judge in sus-

taining an objection taken under section 829, Code C. P., by the plaintiff to the question addressed to the defendant Gerlach upon his direct examination: 'How did it happen that the note was made payable to your order?' Defendant Gerlach had already testified, without objection, that he and one Briggs and Phillips had purchased of Herdic the joint right to use, for the city of Buffalo and adjacent towns, 'Herdic's Cab,' a patented invention, and that each was to pay for his share of the purchase \$2,500 to Herdic and give him his indorsed note therefor. Herdic, Briggs, Phillips and Gerlach thereupon met at the latter's office, and each purchaser there executed and delivered to Herdic his note or notes, the note in suit being given by Phillips to Herdic. Herdic died before the trial. These facts appearing, the question above quoted was asked, and the objection thereto, under section 829, sustained. The appellant now insists that the question did not necessarily call for a personal transaction between the witness and the deceased.

"But it apparently did call for such a transaction; the defendant was trying to establish a defense which, as stated in his answer, in part rested upon a request alleged to have been made by Herdic to the appellant to indorse this note for other purposes than to secure its payment. If the question did not call for a personal request or transaction, counsel did not assist the court by any intimation that such was not its purpose. In deciding upon this objection, the trial court had to decide the preliminary question of fact presented by the objection, namely, whether the question called for a personal transaction between the witness and the deceased, and had to make the decision upon the facts as they then appeared to be. We are now asked to reverse because it is possible that the preliminary fact was otherwise than as the trial court decided it to be.

"We must assume in this, as in other matters of alleged error, that the trial court was right, unless it is made to appear that it was wrong. *Denise v. Denise* (110 N. Y. 562) is cited. But that case is unlike this, because, as the court said, 'nothing was deducible from the mere question as to the person or transaction,' and it was, therefore, not improper to receive

the answer and await a motion to strike it out, if the answer showed that the fact assumed by the objection really existed.

"The judgment should be affirmed, with costs."

Esek Cowen for appellant.

George T. Wardwell for respondent.

LONDON, J., reads for affirmance.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

WILLIAM A. COFF, Appellant, *v.* HARRY B. HOLLINS et al.,
Respondents.

(Argued February 3, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 21, 1889, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial and an order granting defendants an extra allowance.

Robert P. Harlow for appellant.

John R. Dos Passos for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

BARBARA STIMMEL, Appellant, *v.* CHARLES WATTS et al.,
Respondents.

(Submitted February 4, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in

favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury.

C. A. S. Van Nostrand for appellant.

A. N. Weller for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

CHARLES G. MARTIN et al., Appellants, v. HATTIE W. BLISS,
Respondent.

(Argued February 5, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 14, 1890, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

William H. Arnoux for appellants.

L. R. Beckley for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

JOHN W. HAAREN, Respondent, v. JEREMIAH C. LYONS et al.,
Impleaded, etc., Appellants.

(Argued February 10, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 16, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

John Larkin for appellants.

H. H. Glass for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN R. PRICE, Appellant, v. THOMAS A. MAPES, as Assignee,
etc., et al., Respondents.

(Argued February 10, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which modified, and affirmed as modified, a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Edward C. Perkins for appellant.

George M. & T. F. Bush for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

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139 555
132b 562
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EDWARD MITCHELL et al., Respondents, v. THE METROPOLITAN
ELEVATED RAILWAY COMPANY et al., Appellants.

(Argued February 11, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1890, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendants from operating their road in a street in front of plaintiffs' premises.

The judgment, conformably with the complaint, contained an injunction restraining defendants from maintaining and operating their elevated railroad in front of plaintiffs' premises, No. 104 South Fifth avenue, unless within a time limited by the judgment they pay plaintiffs the sum of \$3,000, adjudged to be the value of the easements belonging to the plaintiffs and appropriated by the defendants for the permanent location of the existing structure of the railway and for the operation thereof forever.

The judgment awards \$900 as the value of the property taken from the date of taking and the date of the decision.

The following is the opinion in full :

" The appellants present but a single objection to the judgment, namely, that the court adopted an erroneous measure of damages in ascertaining the compensation to be made for plaintiffs' easements.

" There are two answers to this objection : First. The fact assumed in it does not clearly appear. Second. It is not clearly presented by any exception. The fact assumed is that the court in awarding the plaintiffs fee damages increased them by adding damages for the wrongs and trespasses committed by the defendants. Since the case was tried this court has, in this class of cases, recognized the distinction between fee damages and damage for tort feassance, that is to say, the distinction between compensation for the easements of light, air and access taken by the defendants and damages to the land not taken but by subsequent acts wrongfully injured. (*Am. Bank Note Co. v. N. Y. E. R. Co.*, 41 N. Y. St. Rep. 531 ; *Messenger v. Manhattan R. Co.*, 129 N. Y. 648.)

" By its decision the court found the value of the easements and property taken ; no opinion was written ; no rule of damages was announced during the trial ; testimony was given by the respective parties according to their theories for the consideration of the court ; the decision does not state how the court measured the damages ; the General Term, in its opinion, says that the evidence was sufficient to sustain a much larger award than was actually made, an opinion from which we see no reason to dissent.

" No exception clearly presents the question. Stress is laid by the defendants' counsel upon this question which one of the plaintiffs was permitted to answer : ' Q. What, at the time of the commencement of this action was and at the present time is, the value of the plaintiffs' property in question on the assumption that the elevated railroad is not there ?

" Counsel for the defendants objected to the question as immaterial, incompetent, irrelevant and as not the measure by which to estimate the amount of permanent damages, and that such evidence would include all annoyances by the road as

affecting the fee value of the premises, and not merely the value of the easement.

“ ‘The COURT.— I will take the evidence as one of the factors in the ascertainment of damages and reserve the question as to the application of it. Counsel for defendants duly excepted.

A. From \$40,000 to \$45,000 ’

“ The fact thus called for was material and relevant, and was, as the trial court remarked, one of the factors in the ascertainment of damages. The *Pappenheim* case (128 N. Y. 436-449), a case similar to this, distinctly so holds.

“ No point touching the competency of the opinion of the witness upon the amount of damages was presented by the objection, as in the *Roberts* case (128 N. Y. 455), nor upon a speculative or imaginary condition of things, as in the *Doyle* case (Id. 488), but the objection was based upon the assumption that the witness might possibly include in his answer, as elements of fee damage, some element of the damage subsequently done by the defendants as tortfeasors. Whether the fact assumed in the objection was actually the fact, could be brought out upon the cross-examination of the witness, and it was not improper for the court to admit the answer, and await such motion to strike out as counsel might make. No such motion was made. The defendants’ requests to find do not present the distinction now insisted upon. They were to the effect that the value of the easements themselves taken by the defendants was merely nominal. Such requests presented only part of the case, and without more would not present the objection now urged. Plaintiffs’ easements of light and air were taken to the extent that they were destroyed or fenced out, and as the excluding structure or fence was to be permanent, the taking and the permanent means of taking must, in measuring their value, be considered together.

“ Again this complaint was framed with the view to the recovery of all the damages the defendants had inflicted upon the plaintiffs’ property rights in their lot. It stated the facts and characterized them as a taking of property, but the characterization did not impair the force of the facts alleged.

“ In the light of subsequent decisions, doubtless, the plaintiffs could have brought two actions instead of one. It may

be easy to state in the abstract the legal distinction between fee damage and damage arising from constant tort feissance, but not so easy in the concrete case to see the line which divides them.

"If the plaintiffs have recovered in one action the damages they might have divided among two, in the absence of any exception clearly presenting a protest, justice should not be delayed by a reversal.

"Judgment should be affirmed, with costs."

Brainard Tolles for appellants.

William Mitchell for respondents

LONDON, J., reads for affirmance.

All concur.

Judgment affirmed. _____

THOMAS THORN et al., Respondents, v. THE METROPOLITAN
ELEVATED RAILWAY COMPANY et al., Appellants.

SAME v. SAME.

SAME v. SAME.

(Submitted February 12, 1892; decided March 8, 1892.)

APPEAL from judgments of the General Term of the Supreme Court in the first judicial department, entered upon orders made March 28, 1890, each of which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

Brainard Tolles for appellants.

William Mitchell for respondents.

Agree to affirm judgments upon opinion in *Mitchell v. Met. E. R. Co.* (ante, page 552).

All concur.

Judgment affirmed.

HENRY O. KENYON, Appellant, v. JOHN F. LUTHER et al.,
Respondents.

(Submitted February 12, 1892; decided March 8, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 29, 1890, which affirmed a judgment in favor of defendant entered upon a verdict.

Porter & Walts for appellant.

Watson M. Rogers and *Elon R. Brown* for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

STEPHEN COURSEY et al., Appellants, v. JOHN MORTON et al.,
Respondents.

An intentional withholding and secreting by the assignor of assets of a substantial value from the possession of the assignee, is a fraud upon the rights of creditors of the assignor, and renders a general assignment for the benefit of creditors void.

Every party must be deemed to have intended the natural and inevitable consequences of his own acts, and so, when they are voluntary and necessarily operate to defraud others, he will be deemed to have intended the fraud.

(Argued January 21, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 29, 1890, which affirmed a judgment in favor of defendants entered upon the report of a referee.

The following is the opinion in full:

"This action was brought to set aside a general assignment for the alleged benefit of creditors upon the ground of fraud.

"John and Thomas Morton were copartners engaged in the manufacture of shawls under the firm name of Morton Brothers, at Skaneateles, N. Y. On the 13th day of September, 1887, they executed an assignment in writing to the defendant Sid-

ney Smith of all their property, real and personal, owned by them as copartners, and separately and individually, excepting such as was by law exempt from levy and sale under execution, in trust for the payment of their debts. The trust created by the assignment was accepted by the assignee in the form required by the statute, and the assignment was then delivered to the attorney who drew it, with the understanding that he should proceed to New York with the assignor, Thomas Morton, and, if possible, procure from Messrs. Vietor & Achelis a further advance upon the stock of shawls shipped them, and in case of their failure to procure an advance, to have the assignment recorded.

"The assignment was left with a person in Syracuse by the attorney, with directions to record the same if he should wire him so to do, and then on the evening of that day the attorney, with Thomas Morton, proceeded to New York. On the morning of the next day, they attempted to procure the advance upon the shawls and failed, and thereupon the attorney telegraphed to the person with whom he had left the assignment to have it recorded, and the same was so recorded in the office of the clerk of the county of Onondaga on the afternoon of the 14th day of September, 1887, and thereafter and on the fifth day of October, they executed and filed an inventory and schedules of their assets and liabilities duly verified, as required by statute.

"The complaint alleges that the said assignors have omitted from the inventory and schedules filed by them in the Onondaga county clerk's office a large amount of moneys for the purpose of defrauding their creditors. This allegation was denied by the answer.

"The facts upon this issue are without substantial dispute. They are as follows: On the morning of the 14th of September, 1887, after the assignment had been drawn and executed, as above stated, but before it had been recorded in the clerk's office, John Morton drew from the Skaneateles bank upon the firm check signed by him \$963.50, and delivered the same to his wife, who secreted it in her breast and thus retained it secreted upon her person for about eight months, or until about the first day of May, 1888. In delivering the money to his

wife he told her to put it away and hold it until he called for it again. Before drawing the money from the bank Morton had a talk with his attorney in reference thereto, and asked what they would do for living expenses, and they were told that they would have to get along as best they could, but everything they had must go to their assignee. Morton then asked him if they had a right to pay debts, and was advised that they had a right to draw the money before the assignment was delivered, and pay just and *bona fide* debts with it. John Morton testified that in March previous he had obtained from his wife the sum of \$300, moneys which she had saved out of that furnished her by him for household expenses, etc., and that when he drew the money from the bank he first intended to repay his wife the money had from her, but afterwards he thought it would not be right to pay her, and so he held it to give to any one that it belonged to. This statement he subsequently changed and testified: 'When I changed my mind in regard to paying my wife I expected to use the \$963.50 to compromise with our creditors.' On the 21st day of January, 1888, he was examined in supplementary proceedings and on that occasion testified that the firm had no personal property aside from the shawls in the hands of the parties in New York, and no money in the bank, but upon a further examination upon the third day of February thereafter admitted that he had the \$963.50 in his house 'awaiting for whoever it belonged to.' Thereafter and on or about the first day of May, upon the demand of the assignee, the money was paid over to him. This was about four weeks before the trial of this action. John and Thomas Morton testified that the assignment was made for the purpose of gaining time, but that it was not made with the intention of hindering, delaying or defrauding creditors. The money in question was not entered upon the inventory; the attorney who drew up the inventory testified that he supposed he knew all the circumstances in relation to the assets, as well, if not better, than the Mortons did themselves, and that he made up the schedules without consulting them.

"The rule is that the intentional withholding and secreting of assets of a substantial value from the possession of the assignee is a fraud upon the rights of creditors and renders the

assignment void. (*Shultz v. Hoagland*, 85 N. Y. 464; *Talcott v. Hess*, 31 Hun, 282; *Iselin v. Henlein*, 16 Abb. [N. C.] 73; *Chambers v. Smith*, 38 N. Y. St. Rep. 213.)

"The claim of Mrs. Morton was not one which, under the circumstances, could be paid out of the assets of her husband or that of the firm, and Morton wisely refrained from making use of the money drawn from the bank for that purpose. (*Coleman v. Burr*, 93 N. Y. 17.)

"Morton first tells us that after reaching the conclusion not to pay his wife, that he then 'held it to give to any one that it belonged to.' But he knew that it belonged to the assignee, and that it was the money of the firm; that he and his brother had made a general assignment of all their property; that the assignment included this money, and that he had been advised by his attorney before drawing the money that everything they had must be turned over to the assignee; that if any debts were paid they must be *bona fide* debts, and paid before the assignment was delivered. He had not used the money to pay debts before the assignment was delivered; he had never used it to pay debts, but instead thereof had, during the eight months that intervened after the assignment, kept the same secreted upon the person of his wife.

"It is said that the money was omitted from the inventory for the reason that it was made up by the attorney without consulting the Mortons, and John says he supposed the money was in, but it was signed and sworn to by them. John says he did not examine it, but, as we have seen, as late as January 21, 1888, in giving his testimony in supplementary proceedings, John still insisted that they had no personal property aside from the shawls in the hands of the parties in New York, and no money in the bank. These are the excuses given, but they do not change the main facts. The \$963.50 belonged to the firm and was omitted from the inventory; it was drawn from the bank after the assignment was executed and before it was recorded, and was secreted upon the person of the defendant John Morton's wife for the space of about eight months thereafter, and until it had been discovered in legal proceedings instituted for that purpose.

"Every party must be deemed to have intended the natural and inevitable consequences of his acts, and where his acts are voluntary and necessarily operate to defraud others he must be deemed to have intended the fraud. (*Coleman v. Burr, supra; Cunningham v. Freeborn*, 11 Wendell, 240-252; *Ford v. Williams*, 24 N. Y. 359; *Edgell v. Hart*, 9 id. 313; *Wilson v. Robertson*, 21 id. 587-593.)

"The necessary and inevitable consequences of the acts of Morton, as above related, were to deprive the creditors of the money so retained by him, and they were thus defrauded out of that which belonged to them. True, he says he did not intend to hinder, delay or defraud, but his acts necessarily did defraud by depriving the creditors of that which belonged to them, and in the eye of the law he must be deemed to have intended that which he knew to be the inevitable consequences of his acts. But he says he retained this money, expecting to use it to compromise with his creditors. It appears that after the assignment an effort was made on the part of his attorney to bring about a compromise. This fact does not change the character of the transaction. He had no right to retain and secrete money for the purpose of using it in effecting a compromise. Whilst a creditor has the right to make a statement of his financial condition and ask his creditors to compromise, an assignor has no right to secrete a part of his assets and then induce his creditors to accept a less sum than they otherwise would under the supposition that the whole assets had been disclosed in the inventory.

"The money retained was of a substantial amount. It was substantially all of the assets of the copartnership that were at the time available. There was real estate, but it appears to have been heavily incumbered with mortgages. The shawls manufactured by the firm had been shipped to dealers in New York for sale, and they had advanced thereon all that they could be induced to. There was some office furniture and coal on hand, and four hundred pounds of wool, some mill supplies and mill machinery, and \$600 that belonged to Thomas Morton individually. These were the assets. The liabilities exceeded twenty thousand dollars in amount. It will, therefore, be readily seen that the money withheld by the

defendant John was an important, if not the greater, part of the assets.

"It is said, however, that because the money was paid over to the assignee no harm has been done to the creditors. It was not, however, paid over until after this action was brought and nearly ready for trial. At the time the action was brought the money was fraudulently withheld from the assignee, and the assignment was then void. The Mortons could not, by their subsequent acts, be permitted to change the rights of the parties as they then existed. To do so would be equivalent to saying to assignors in the future that they could retain and secrete such portion of the assets as they saw fit, and if not discovered it would be all right, but if discovered they could at any time before the trial turn the same over to the assignee and thus maintain the validity of their assignment.

"It appears to us that the exceptions were well taken to the refusals to find the 9th, 10th and 10½ requests, and so much of the 10th finding of fact as related to the matter discussed, and that the judgment should, consequently, be reversed and a new trial granted, with costs to abide the event."

Louis Marshall for appellants.

Geo. Barrow, Goodelle & Nottingham and Waters & McLennan for respondents.

HAIGHT, J., reads for reversal.

Ali concur, except BRADLEY, VANN and BROWN, JJ., dissenting, who were of the opinion that, while the General Term might, with great propriety, have reversed the judgment upon the ground that the findings of the referee were opposed to the weight of evidence, still, as there was some evidence to support the referee's conclusion, this court could not interfere.

Judgment reversed.

FRANK W. MILLER, Respondent, *v.* THE UNION SWITCH AND
SIGNAL COMPANY, Appellant.

(Argued January 26, 1892, decided March 15, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1890, which overruled defendant's exceptions and ordered judgment for plaintiff on a verdict directed by the court.

The plaintiff, as assignee of Charles R. Johnson, brought this action to recover \$1,625 alleged to have become due and payable to said Johnson under a written contract between him and the defendant, executed September 20, 1886, whereby it was agreed in substance (1) that Johnson should become the general manager of the defendant; (2) defendant to pay him a salary of \$4,500 per year; (3) he should sell to the defendant the exclusive right to use all his inventions relating to the signal business, and also the right to use the inventions of Henry Johnson relating to signal switches then or thereafter acquired by Charles R. Johnson, and (4) defendant to pay him \$3,000 per year therefor; (5) employ Henry Johnson as manager of its works at \$4,000 per year; (6) defendant also to pay Charles R. Johnson, in addition to the above, ten per cent net profits of the company.

The contract further provided as follows:

"Seventh. It is mutually agreed that this contract shall continue for a period of ten years, subject to termination by either party, however, by one year's notice (in writing) to the other party at any time after the second year, or by the death of Charles R. Johnson, or by his permanent inability to perform his duties as general manager."

"Eighth. It is further mutually covenanted and agreed that in the event of the termination of this agreement, the said company, by reason of the expenditures that shall have been made during the continuance of this agreement, shall have a license, not exclusive, to use all the inventions that may have been used in carrying on the business of the company, on the payment of sixty-five hundred dollars per year, said sum to

be paid quarterly; and shall be entitled to purchase from the said Charles R. Johnson, or his executors, the exclusive right to use all of the inventions upon as favorable terms as he or his executors may be willing to grant to any other parties."

"Ninth. This agreement to take effect from June 1, 1886, so far as the management of the business is concerned, but to take effect so far as the payments are concerned July 1, 1886; all accounts and expenses and all details with reference to the past business of the company to be adjusted during the month of June."

The complaint alleges "that the contract continued in existence and was acted upon by both parties thereto, and the said Charles R. Johnson continued under said contract to be general manager of the defendant company down to the 1st day of March, 1888, when the said contract was terminated by the said defendant company, and the said Charles R. Johnson was notified by the defendant to that effect, and that his services would be no longer accepted by the said defendant after the 1st of March, 1888."

"That under said contract the defendant had used and was on the 1st day of March, 1888, still using and has since that time continued to use, certain appliances invented by said Charles R. Johnson, and for which he held letters patent, and certain other inventions and appliances invented by Henry Johnson, but held and controlled by said Charles R. Johnson, which were referred to in said contract," and further alleges that there was due to Charles R. Johnson, on September 1, 1888, to be paid him by defendant as royalties under the contract, \$1,625, for the quarter ending that day, and specifies the particular inventions referred to in the contract.

The answer admits the making of the contract and "it admits that on March 1, 1888, it dismissed Charles R. Johnson from its employ," denies its use of his inventions after that date, and also those of Henry Johnson.

The following is the opinion in full:

"The theory of the plaintiff's action is that the contract between Charles R. Johnson and defendant was terminated March 1, 1888; that thereafter the defendant continued the use of his inventions and those of Henry Johnson, and thus

by the terms of the eighth provision of the contract became indebted to Charles R. Johnson in the sum of \$1,625 for the quarter ending September 1, 1888.

"The defendant's contention is that the dismissal of Charles R. Johnson from its employment was a mere breach of the contract and not the termination of it provided for in its seventh clause and, therefore, the eighth clause of the contract was not brought into operation.

"This construction of the contract has recently been upheld by this court in an action for another installment of royalties under the contract brought by Charles R. Johnson against this defendant. (*Johnson v. Union S. & S. Co.*, 129 N. Y. 653.)

"This construction of the contract requires a reversal of the judgment, unless such a termination of the contract as brings its eighth clause into operation is admitted upon the pleadings. The General Term held that it was admitted. In construing the pleadings it is proper to notice the construction given them by the trial court in this respect.

"The allegation of the complaint is that 'the said contract was terminated by said company, and the said Charles R. Johnson was notified by the defendant to that effect and that his services would be no longer accepted by the said defendant after said 1st day of March, 1888.'

"The answer contained no denial of these allegations, but contained this allegation: 'It admits that on March 1, 1888, the defendant dismissed Charles R. Johnson from its employ.'

"Upon the trial the plaintiff's counsel contended that the pleadings admitted the termination of the contract. The defendant's counsel contended that only the termination of employment was admitted. After considerable discussion the defendant's counsel remarked that if there was any doubt as to his construction of the pleadings he would move to amend at once. The plaintiff's counsel was heard upon the motion to amend. The court disposed of the motion by this remark: 'There is nothing in this case or in the pleadings that prevents your alleging here that whatever termination there was, was not the termination provided for by covenant eight of the contract.' Defendant's counsel then said: 'I only asked for the

amendment upon the assumption that there might be some other contention made.'

"There was no question, apart from the allegation in the complaint, that 'the said contract was terminated by said company,' but that the dismissal of Mr. Johnson was what effected the alleged termination.

"The complaint apparently alleges that the termination of the contract was thus effected. The plaintiff proved upon the trial the summary and peremptory manner in which he was dismissed.

"The trial court, therefore, adopted no forced or strained construction of the pleadings when it held, as it in effect did, that there was nothing in them to preclude the defendant from insisting that the actual termination was not the one contemplated by the contract. Except for such a construction of the pleadings justice would seem to indicate that defendant's motion to amend the answer would have been granted.

"With that construction no amendment was needed.

"The defendant was permitted to insist upon the defense which the evidence disclosed. It would be unjust now upon appeal to deprive the defendant of that defense, by receding from the construction of the pleadings adopted and accepted upon the trial and giving them a contrary construction. Especially is this so in view of the fact that the termination of the contract alleged in the complaint is as consistent with a termination which does not call the eighth clause of the contract into operation, as with the termination which does; and, therefore, the admission in the answer may be true without conceding the proposition upon which the plaintiff's right to recover rests.

"The judgment should be reversed and a new trial granted, with costs to abide the event."

John W. Houston for appellant.

George W. Miller for respondent.

LONDON, J., reads for reversal.

All concur.

Judgment reversed.

OTTO SCHMIDT, Respondent, *v.* THE STEINWAY AND HUNTER'S
POINT RAILWAY COMPANY, Appellant.

Plaintiff was engaged in digging a trench in a street by the side of defendant's railroad track. A barrier of planks resting on sections of sewer pipe was erected around the excavation. As one of defendant's cars passed a piece of pipe fell into the trench, injuring plaintiff. In an action to recover damages plaintiff's evidence was to the effect that the car struck the pipe, causing its fall. Another car had just passed without striking the pipe. It appeared that when this car approached the excavation the driver stopped it, the conductor looked along the track and thought there was room to pass, and the foreman of the contractor who was making the excavation, signalled to the driver to come on; he drove along at a walk, passed two of the sections of pipe and struck the third. *Held*, that the evidence failed to establish negligence on defendant's part, and that the submission of the question to the jury was error.

(Argued January 27, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

The following is the opinion in full:

"This action was brought to recover damages for a personal injury.

"The plaintiff was in the employ of one George H. Smith, a contractor, and was engaged in digging a trench for a sewer along Steinway avenue in Long Island City, parallel to and by the side of the defendant's horse railroad in that avenue. At about six o'clock in the afternoon of June 1, 1888, the men engaged in excavating the trench were directed to erect a barrier around the excavation. This was done by laying planks across the trench, standing sections of sewer pipe on either side and placing planks on top thereof to form a guard-rail around the trench.

"The plaintiff remained in the trench and assisted in adjusting the plank on which the sewer pipe was placed, which subsequently fell. The plank was twelve inches in width, whilst the pipe that was placed thereon was fifteen inches in diameter.

The pipe was placed within a foot and a half to two feet from the rail of the defendant's track. At this instant one of defendant's cars passed along the track, and the pipe fell into the trench upon the plaintiff, causing the injury for which this action was brought.

"It is claimed on behalf of the plaintiff that the car in passing struck the sewer pipe, causing it to tip over and fall, whilst on behalf of the defendant it is claimed that the car did not hit the pipe and that it toppled over in consequence of the vibration caused from the car, or from the caving of the earth on the side of the trench underneath the plank.

"The witness Preiser says that the car struck the pipe, whilst Policeman Burden testified that he was riding upon the car, sitting upon the front seat next to the sewer; that he heard no crash, felt no jar and did not notice that the car struck the pipe, but he saw the pipe topple over and fall.

"The only theory upon which the defendant could be charged with negligence is that the driver ran his car against the pipe, knocking it over.

"The evidence to which we have referred required the submission of that question to the jury, which found for the plaintiff, and we must, therefore, on this review, assume that the pipe was struck by the passing car.

"But was the company or the company's driver at fault? There is no substantial dispute as to the circumstances. The driver approached with his car to the place where the excavation commenced and then stopped. Three pipes were standing in line by the side of the excavation. A car had just passed them without hitting. The conductor of the car looked along the side and thought there was sufficient space to pass. The foreman of the contractor signalled the driver to come on, and thereupon he drove along with his horses upon a walk, passing two of the sewer pipes, but striking the third. All of the witnesses agree, including the plaintiff, that the car was stopped and did not advance until the signal was given, except the foreman who thinks that this car did not stop but that the one in advance did. He, however, does not claim to be certain and concedes that he made a motion with his arm for the car to come. The plaintiff had only worked two days and was

not much acquainted with the men. He says that he saw a big, tall man standing there and he gave commands for the cars to stop or start; that he had seen the man that day and the day before doing that. He further stated: 'He was not in our gang of workmen.' And the witness Preiser said he was not one of their workmen. All of the other witnesses agree that it was Moses Smith, the foreman, and Smith himself states that there was no one there to tell the cars to come on or stop but himself and that he generally did that by giving motions with his arm. It will be observed that whilst the plaintiff and witness Preiser state that the man who gave the signal to advance was not a fellow-workman of theirs, they do not say that it was not the foreman Smith. This is the only variance, if such it can be considered, in the evidence.

"It is quite apparent that the driver of the car proceeded upon the signal of the foreman of the contractor, under a supposition that the sewer pipes had been properly placed a sufficient distance from the track to allow his car to pass without hitting. It is said that he must have known that men were working in the trench; that he could have seen the pipe standing by the side of the sewer and that he should have taken other precautions to avoid the accident; that he should have measured the distance and made sure that his car would not hit the pipe.

"This view appears to have been taken by the General Term, the presiding judge saying that the company owed extreme vigilance in the management of its cars and this duty was increased by the excavation. We do not, however, understand the rule to be as broad as there stated.

"A careful man is guided by a reasonable estimate of probabilities. His precaution is measured by that which appears likely in the usual course of things. The rule does not require him to use every possible precaution to avoid injury to others. He is only required to use such reasonable precautions to prevent accidents as would ordinarily be adopted by careful, prudent persons under like circumstances. (*Barker v. Savage*, 45 N. Y. 191; Ray on Negligence, 133.)

"Had the pipe stood in front of the defendant's car so that the driver could have seen that the car must necessarily strike

it, a different question would have been presented. The pipe was not so placed. It was negligently placed by the employes of the contractor so near the track that it was hit by the car, but the driver standing upon the platform, looking at it from that position, could not see that his car would hit. He proceeded under the signal of the foreman with the supposition that the employes of the contractor had placed it a sufficient distance to permit the passage of his car, and, under the circumstances, it does not appear to us that it was necessary for him to stop and measure before proceeding, and that he is chargeable with negligence because of his failure so to do. He but did what every other man would have done under like circumstances.

"We are, therefore, of the opinion that the evidence failed to establish negligence on the part of the defendant, and consequently the judgment should be reversed and a new trial granted, with costs to abide the event."

VANN, J. I dissent upon the ground that it was for the jury to say whether the driver exercised the care required by the circumstances when, after coming to a full stop, he drove on "pretty fast — at a good gait," standing in the middle of the platform, without looking to see or getting in a position where he could see whether his car would strike the section of sewer pipe, or whether there was anyone in the trench who might be injured, or taking any precaution to prevent injury to those engaged in making the excavation.

George W. Stephens for appellant.

M. L. Towns for respondent.

HAIGHT, J., reads for reversal.

All concur, except VANN, BRADLEY and BROWN, JJ., dissenting.

Judgment reversed.

FRANK T. LACROY, Respondent, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.

Plaintiff was employed as a brakeman upon one of defendant's freight trains. One of its printed rules required brakemen, before starting, to test the hand brakes, "and see that they are in proper condition and work easily." This was not done by plaintiff or any of the brakemen upon the train in question. The train stopped for about two hours at a station where the cars were usually inspected, but no inspection was made. The train stopped at another station, just beyond which was a steep down grade, but although plaintiff and his associates well knew of this grade and of the dangers incident to an attempt to take such a train down without the brakes being in good order, and also, that the brakes of heavily loaded moving cars were apt to get out of order, made no examination. Upon attempting to set the brakes, after the train started upon the down grade, it was discovered that a number of them would not work, and in consequence the speed of the train could not be checked, a greater portion of it was thrown from the track and plaintiff was injured. In an action to recover damages, it appeared that plaintiff knew of and had read the printed rules. *Held*, that as disobedience of the rules caused the accident, plaintiff was not entitled to recover.

It seems that had plaintiff been unacquainted with the rules he would not be entitled to recover, as with full knowledge of the dangers, it was incumbent upon him and his associates to ascertain before reaching the down grade that a sufficient number of the brakes to properly check the train were in order.

LaCroy v. N. Y., L. E. & W. R. R. Co. (57 Hun, 67), reversed.

(Argued January 28, 1892; decided March 15, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made the first Tuesday of June, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries received by plaintiff, through defendant's negligence, while in its employ.

The following is the opinion in full :

"April 25, 1887, a train crew, of which the plaintiff was a member, consisting of an engineer, fireman, conductor and four brakemen, undertook to take a train of forty cars, loaded

with coal, from Brockwayville to Bradford, a distance of between sixty and eighty miles.

"One of the rules of the company then in force, relating to the duties of the brakemen, provided that they should 'assist in the shifting and making up trains, and before starting must test the hand-brakes and see that they are in proper condition and work easily, and see that the train signals are in good order and ready for immediate use.'

"Before starting this train from Brockwayville, the brakemen, of whom the plaintiff was one, did not, nor did any of them test the hand-brakes. So when the train moved out, whether they were in good working order or not, the brakemen were not informed. At Johnsonburg, about twenty-eight miles distant, the cars were usually inspected, but on this occasion such precaution was omitted, although the train was on a side track for nearly two hours. But such omission did not prompt the brakemen to test the brakes, although it appears from their testimony, that with such heavily laden cars the brakes frequently get out of order after a train has started towards its destination. Until the train reached Freeman's switch, each of the four brakemen had charge of the brakes on ten cars, the plaintiff having charge of the last ten. At that place one of the brakemen was injured and thereafter the plaintiff took charge of the last twenty cars of the train. From Crawford's Junction there is a down grade in the direction in which the train was running, for a distance of nearly six miles, averaging over one hundred feet to the mile. At some places the incline is greater than at others, and there are a number of sharp curves and some reverse curves.

"The plaintiff's witnesses unite in testifying that the grade was so steep and the curves so numerous that in order to take a train of forty loaded coal cars down it was necessary to have from thirty to thirty-five brakes in good working order.

"It also appeared that these brakemen had more or less experience in taking trains down Shanty hill, and that the plaintiff had in the capacity of brakeman taken part in running trains up and down this hill for seven or eight years prior to the date of the accident.

"Yet when Crawford's Junction was reached, from which point this steep descent began, with full knowledge of the dangers incident to an attempt to take such a train down without having thirty or thirty-five brakes in good working condition, and well knowing that the brakes on heavily loaded cars are apt to get out of order while a train is in motion, neither the plaintiff nor his associate brakemen had made any effort to test the brakes for the purpose of ascertaining whether they were in condition to do the work about to be required of them.

"As the train left Crawford's Junction the brakemen commenced to set the brakes, and then, according to their testimony, ascertained for the first time that a number of them would not work. But it was then too late to either repair them or sidetrack the cars having the defective brakes, as was the custom, for the train was beyond control. Realizing the danger of the situation the brakemen employed their best efforts to check the rapid movement of the train, but without avail, and its speed kept on increasing until it was running at the rate of sixty miles an hour, when the greater portion of the train was thrown from the track, the cars piled on top of each other, resulting in great loss of property to the defendant and personal injury to the plaintiff.

"It is the contention of the plaintiff, who was one of the responsible actors in the occurrences which resulted in such serious damage to the property of the defendant that it should also respond to him in damages for his personal injuries.

"It is not contended that the defendant omitted to provide suitable rules and regulations for the management of its railroad, nor that it omitted to employ competent and skillful men to keep its railroad apparatus in proper working order and to operate its trains, and if it had appeared that its rules and regulations had been put in possession of these several brakemen with instructions to read and observe them, this case would have been brought within the rule laid down in *Byrnes v. New York, Lake Erie & Western R. R. Co.* (113 N. Y. 251), and the defendant absolved from liability. But in the absence of such proof the learned trial court reached the conclusion that if the plaintiff did not have actual knowledge of

the existence of the rules, he could not be held responsible for his failure to test the brakes, and might recover.

"That question he submitted to the jury, who found in favor of the plaintiff.

"We shall first consider whether there was any evidence authorizing the jury to find that the plaintiff did not have knowledge of the rule of the company, which undisputably he failed to obey, for if not, the refusal to dismiss the complaint was error.

"The plaintiff's evidence in that regard is as follows:

"Q. In your caboose you had a little book of instructions — Mr. Bowen's Book of Instructions, didn't you? A. No, sir.

"Q. Look at that and see if you recognize that. [Counsel presents book to witness.] A. I saw one of them; we didn't have none in the caboose; I had seen them before; I knew the company had such books, because John Burns, when I was braking for him, had one; he was my conductor.

"Q. Where did he keep them? A. He had them in his desk; in the trunk in the baggage car; I had seen these a great many times; I knew that they had them; I knew that they had been used during the last time I was in the service of the company.

"Q. That stated what the duties of the different persons were — conductors, enginemen and flagmen, etc.? A. Yes, sir.

"Q. The trainmen had access to it; they had an opportunity of seeing that and reading that? A. Yes, sir.

"Q. You read, don't you? A. Yes, sir.

"Q. Have you read in that? A. I read one at one time; the only one I saw.

"Q. How long before you got hurt that you read one of these books? A. It was five or six years.

"Q. Did they give you any book; furnish you any book? A. No, sir.

"Q. Nor rules? A. No, sir.

"Q. Now, you understand that the duties were contained in this book, of course? A. I didn't understand a great deal of it, because I just read over one or two pieces in it; I understood there was printed in that the duty of each man; the brakemen and engineers and conductors.'

"In this connection we quote the evidence of the conductor who was called on the part of the plaintiff and was in charge of the train at the time of the accident :

" 'Q. Do you recognize this as a guide-book, a book of rules of the defendant? [Counsel presents book to witness.] A. Yes, sir; it was in force then. At page 83 is a specification of the duties of the flagman.

" 'Q. Did you have in your caboose one of these books of Mr. Bowen's bearing date June 1st, 1883? A. There was one of the books in the caboose, in the desk. One was generally kept there in the caboose, and was there at this time. I don't know how long it had been there. We generally had one upon the train, to which all these employes had access. These I understand to be a duplicate of the rules and regulations furnished the employes of the company; the duties of freight brakeman I find on page 83.'

"It will be observed that the witness in the course of his testimony said, with reference to this book of rules, that when John Burns was his conductor he (Burns) kept it in his desk in the baggage car; that witness had seen it a great many times; knew they had it in use during the time he was in the service of the company; that the trainmen had access to it, and an opportunity of seeing it and reading it; that he could read, and had read one; and further strengthened the positiveness of his statement by asserting the fact that the book stated the several duties of the positions of conductor, engine-men, flagmen, etc.

"Now, in the testimony so far quoted, there is nothing which contradicts, or tends to contradict, his statement that he had seen the book, had read it and knew that it stated the duties of the different grades of employes.

"On being recalled the plaintiff testified as follows :

" 'Q. Was you ever furnished one of these books? A. No, sir.

" 'Q. And requested and required to read it? A. No, sir; never.

" 'Q. Anything ever said to you about it by your employer? A. No, sir.

“Q. Yet you knew it was one of the books of the company and contained the train rules? A. Yes, sir.’

“This evidence, it will be observed, does not in any way contradict or vary that previously given. The plaintiff declares that he was not furnished with a book of rules; not that he did not see one or have access to it. He asserts that he was not requested or required to read it, not that he did not in fact read it. The apparent object of this testimony was to show that the company did not bring the rules to his attention in the manner it should have done. But the question we are considering is not whether the defendant properly promulgated the rules as to the plaintiff, but whether they in fact came to his knowledge, and we think the evidence permits of no other inference than that they did. As the failure to obey the rules occasioned the accident, the plaintiff whose neglect was in part at least responsible for it cannot require the defendant to compensate him for his injuries.

“Had he been unacquainted with the printed rules we think he should not have recovered. Neither the plaintiff nor his associate brakemen can offer as an excuse for their conduct that they were without adequate experience in the handling of trains, or unfamiliar with the duties, or with the dangers incident to running a heavy train down Shanty hill. They had been long employed in that work, knew the brakes were liable to get out of order while a heavily loaded coal train was moving over such grades, were fully acquainted with this particular railroad, the plaintiff having been a brakeman on it between seven and eight years, and understood fully the danger of attempting to take a train consisting of forty cars loaded with coal down Shanty hill with less than thirty or thirty-five brakes in good condition.

“It follows that in the absence of printed instructions the plaintiff and the rest of the train crew well knew that their duty to their employer, and a proper regard for their own personal safety, made it incumbent upon them to know before reaching the point where the steep descent began, which continued for nearly six miles, whether the train contained the requisite number of brakes to properly check its speed, and as a necessary consequence the plaintiff cannot require the defend-

ant to make good to him the damages resulting from an injury which could not have been sustained had he and his co-employees observed that reasonable care and caution which their experience suggested and the situation demanded.

"The judgment should be reversed."

James H. Stephens, Jr., for appellant.

J. G. Record for respondent.

PARKER, J., reads for reversal.

All concur, except BRADLEY and VANN, JJ., dissenting.

Judgment reversed.

182	576
162	66

FRANK JOHNSON, Respondent, *v.* NETHERLANDS AMERICAN
STEAM NAVIGATION COMPANY, Appellant.

Plaintiff was a gangwayman in the employ of one L., a stevedore, engaged in unloading a vessel belonging to defendant. Under his agreement with defendant, L. was to be paid a stipulated price per ton for unloading, defendant to furnish the steam power and a man to run the winch. Plaintiff gave the signals to the winchman. Plaintiff, to hoist a load, gave the signal to go ahead, which was done by the rope winding around the drum of the winch. In hoisting the load in question the rope ran off the drum. The winchman stopped and called plaintiff's attention to this. The latter supported the hoist by means of a hook and then seized the rope to lift it on to the drum, ordering the winchman to back so as to loosen the rope. Instead of doing so the winchman went ahead and plaintiff's hand was drawn against the drum and he was injured. In an action to recover damages, it did not appear that L. had power to order or control the winchman, further than to signal to him through the gangwayman. *Held*, that the winchman could not be regarded as the servant of L.; that the fact that he received orders when to hoist or lower from plaintiff did not change his relations to defendant as its servant, and that as his negligence caused the injury defendant was liable.

(Argued February 9, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 21, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and also affirmed an order denying a motion for a new trial.

The following is the opinion in full :

“ This action was brought to recover damages for a personal injury. Upon the trial there was some conflict in the testimony, but as settled by the verdict the facts are as follows : The plaintiff was the gangwayman in the employ of one Lithman, a stevedore, engaged in unloading the defendant's steamship P. Calland. Under the agreement the stevedore was to be paid a stipulated price per ton for unloading the vessel, the defendant to furnish the steam power and a man to run the winch. The winchman furnished by the defendant was a sailor. The plaintiff, as gangwayman, gave the signal to the winchman to go ahead or back up as the persons engaged in unloading the vessel might require. The men in the hold of the vessel had loaded nine bags of coffee, and the plaintiff had given the signal to the winchman to go ahead. This was accomplished by the rope winding around the drum of the winch. The hoist had proceeded until the cargo had nearly reached the combing of the vessel, when the rope ran off from the drum of the winch onto the axle. The winchman then stopped and called the attention of the plaintiff to the fact that the rope was foul upon the axle of the winch. The plaintiff then supported the hoist by means of a burton hook, after which he took hold of the rope to lift it from the axle onto the drum, but in order to do this had to have the winch turned back so as to loosen the rope. He, therefore, gave direction to the winchman to ‘ come back,’ but instead of turning back the winchman went ahead, drawing the hand of the plaintiff against the drum, cutting off some of his fingers.

“ It is claimed that Lithman was an independent contractor having charge of all of the men engaged in unloading the vessel, and that the defendant is not liable for the negligent act of servants working under his direction. The question is as to whether the winchman was the servant of Lithman, and consequently the co-servant of the plaintiff. Lithman testified that he was paid by the ton ; that the vessel furnished the steam power and a winch driver. This is the evidence as to the contract with the defendant. It does not appear that he had the power to order, direct, discharge or control the winch

driver farther than to signal to him by way of the gangway-man when to hoist or lower, go ahead or come back. It consequently does not appear to us that the winchman could be regarded as the servant of Lithman. It is quite apparent that it was the intention of the defendant to retain charge of the steam power and winch and operate it through its own servants and employes. And the fact that the winchman received orders from the plaintiff when to hoist and when to lower, under the circumstances of this case, does not operate to change his relations to the defendant as its servant. (*Sullivan v. Tioga Railroad Company*, 112 N. Y. 643, 647; *Sanford v. Standard Oil Co.*, 118 id. 571; *Kilroy v. D. & H. C. Co.*, 121 id. 22; *Butler v. Townsend*, 126 id. 105.)

"The judgment should be affirmed, with costs."

Joseph A. Shoudy for appellant.

Charles J. Patterson for respondent.

HAIGHT, J., reads for affirmance.

All concur, except FOLLETT, Ch. J., PARKER and LANDON, JJ., dissenting.

Judgment affirmed.

CLARENCE B. CONGER, Appellant, v. WOLSEY T. WEYANT et al., Respondents.

(Argued March 7, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1889, which affirmed a judgment in favor of defendants, entered upon a verdict directed by the court, and also affirmed an order denying a motion for a new trial.

Irving Brown for appellant.

George W. Weyant for respondents.

Agree to affirm on opinion in *Conger v. Treadway* (*ante*, page 263).

All concur, except BROWN, J., not sitting.

Judgment affirmed.

DAVID MAYER, Appellant, *v.* THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY, Respondent.

(Argued March 7, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 14, 1890, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

B. F. Einstein for appellant.

Hamilton Harris for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

FRANCIS PARIS OSBORN et al., Repondents, *v.* SAMUEL EDGAR
et al., Impleaded, etc., Appellants.

(Argued March 8, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of plaintiffs, entered upon an order made May 28, 1890, upon an agreed case submitted under section 1279 of the Code of Civil Procedure.

Charles E. Rushmore for appellants.

John N. Lewis for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

132	580
160	86

EDWIN L. THOMAS, Respondent, v. JAMES P. STEWART et al.,
Impleaded, etc., Appellants.

An architect, who is also employed by the owner as his agent and representative in the erection of a building, has authority to consent to the substitution of material inferior to that called for by the contract.

Where, under a building contract, by which the contract price is to be paid by installments, a demand is made by the contractor for the installment due, and payment is refused, the contractor may lawfully refuse to go on with the contract.

Where, by a building contract, payments are only to be made upon certificates of an architect, the refusal of the architect to give to the contractors a certificate, as required, if based upon an unreasonable requirement, will furnish no protection to the owner.

(Argued March 8, 1892; decided March 22, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action for the foreclosure of a mechanic's lien filed under the general act against certain property in the city of Yonkers belonging to the defendant Sahagian. Other lienors, who were joined as defendants, appeared and asserted their claims by answers duly served upon the owner.

By a contract dated September 28, 1888, the firm of Stewart & Edmonds agreed to furnish the materials and do the work required by the carpenter's plans and specifications to erect a four-story brick building for Mr. Sahagian, who agreed to pay therefor the sum of \$6,176, in four payments, each to be made on the certificate of the architect, the first of \$1,500, when the building was enclosed and the roof on; the second of like amount when the floors were laid, "partitions set and ready for mason;" the third of \$1,600, when the windows were in "and standing trim * * * on," and the fourth of \$1,576, when the contract was completed and the building accepted. The first payment was made without objection and the refusal of the owner to make the second resulted in a refusal of fur-

ther performance by the contractors. Each party to the contract claimed that the other made the first default and the trial court found against the owner on that issue. The contractors abandoned the contract March 5, 1889, and the next day made a general assignment for the benefit of their creditors to the defendant Stewart. March 23, 1889, the owner caused notices to be served upon the contractors and their assignee requiring them to complete the contract according to the plans and specifications, and on their omitting to do so, although there was no provision in the contract on the subject, he completed it himself at an expense of \$3,989. He conceded a recovery to the extent of the difference between that sum and the amount unpaid on the contract, which is enough to protect the plaintiff, but not enough to fully pay all of the other lienors.

The trial judge found that by the fifteenth of February, 1889, the contractors had performed all the work and furnished all the materials required to entitle them to the second payment and that they demanded a certificate from the architect, accordingly, but that he wrongfully and unreasonably refused to give them one. They also demanded the second payment from the owner, after informing him of the facts, but he refused to pay any part thereof without the certificate of the architect, and soon after they refused to complete the building.

Upon the request of the defendant, it was further found that at the time of the abandonment of the contract, the contractors "had not made and set in each partition back of each water-closet a four by ten inch ventilator with round tin ventilator in each closet and extended two feet above the roof, as required by the specifications;" that they "had not placed in the cellar, beneath the girders, the two locust posts," as so required, and that window frames made of cottonwood "were put in without the knowledge or consent" of the owner. The court refused to find upon the like request that several other things required by the specifications had not been done.

The appellant did not ask for a reversal of the judgment, but for a modification thereof by deducting all that was allowed against him, except the difference between the amount unpaid and the cost of completion.

The following is the opinion in full :

"If the second installment was due when the demand of payment was made by the contractors, they could lawfully decline to go on with the contract, because the owner had refused performance on his part. (*Graf v. Cunningham*, 109 N. Y. 369; *Schwartz v. Sanders*, 46 Ill. 18.) If the second installment was not then due, the contractors were in default and the lienors, who claim under them, are entitled to a recovery only to the extent conceded by the owner, or to the difference between the amount unpaid at the date of such default and the sum required to complete the contract. (*Van Clief v. Van Vechten*, 130 N. Y. 571; 42 N. Y. S. R. 736; *Malbon v. Birney*, 11 Wis. 108.)

"By the terms of the agreement, the second payment was to become due when the floors were laid, "partitions set and ready for mason." The owner claims that the contractors failed in performance, to the extent necessary to entitle them to the second payment, by omitting several things required by the plans and specifications. The lienors claim that the features omitted were waived by the architect, prevented by the owner, or not required to be done as a condition precedent to the second payment, and evidence was given in support of the claim, but the court made no specific finding upon the subject. The use of cottonwood in certain window frames, required to be made of pine, was not denied, but one of the contractors testified that on hearing that the architect objected, he went to see him and said that cottonwood could be used as well as pine; that they were merely skeletons and were covered over with pine casings on the outside and inside. After hearing this explanation, the architect said: "You may use those frames, but bring no more cottonwood on the job." The witness further testified that no cottonwood was used after that, except that some balusters were turned for use on the rear piazza, but they were no part of the work required to be done prior to the second payment. According to the evidence of another witness, no cottonwood whatever was brought on the premises after the architect objected. The architect testified that he allowed certain window frames made of cottonwood to be put in, provided the contractors would use no more cottonwood in the building, but he claimed that after that, more

window frames of the same kind were put in against his protest. When, however, he was asked to certify that the second payment was due, he did not mention this as an objection, but based his refusal upon other grounds.

"There was other testimony tending to corroborate the theory of either side upon the question of consent to the change, which thus became a question of fact for the trial court to determine, and it will be presumed, in support of the finding that the second payment was due, that the court found in favor of the lienors upon this issue. (*Ostrander v. Hart*, 130 N. Y. 406; 42 N. Y. St. Rep. 513; *Thompson v. Bank of British North America*, 82 id. 1; *Bump v. Nat. Bank of Pottsdam*, 96 id. 125.) But the appellant insists that the architect had no right to substitute an inferior article without the consent of the owner, and the authorities support that position. (*Glacius v. Bluck*, 50 N. Y. 145; *Bigler v. Mayor, etc.*, 9 Hun, 253.)

"The court, however, found, upon evidence that is not printed in the case, but which, it is expressly stipulated, proved the fact, 'that said Sahagian employed the said George Rayner as his architect and servant to superintend the work of erecting said house and the doing of the work thereof, and the said Rayner did so superintend such work and the erecting of such house.' The contract provided that all work was to be done to the satisfaction of the architect, and the owner told one of the contractors that everything was left with the architect. Inasmuch as Mr. Rayner was not only the architect but was also the agent of the owner and represented him in the erection of the building, we think that he had authority to consent to the substitution complained of. The fact that the change was made without the knowledge or consent of the owner, as found by the court, evidently means, when the context is considered, without his personal knowledge or consent.

"It is further insisted that injustice was done the owner because the contractors failed to put two locust posts in the cellar, beneath the girders, as required by the specifications. The object of these posts was to support the girders, which in turn support the partitions, that were to be set and ready for the mason before the second installment became payable,

While there was nothing in the specifications to indicate when the posts were to be put in, as the object in putting them in was to support the partitions, it is reasonable to conclude that it was contemplated by the parties that they were to be placed in position before the partitions were built. The contractors, however, were only to do the carpenter work. They had nothing to do with the mason work, which the owner was to do himself. Evidence was given tending to show that the locust posts could not be put in, because the cellar was not sufficiently excavated to permit it, and the stone foundations upon which they were to rest were not built, all of which was mason work. The contractors, therefore, put in temporary posts, so that they could go on with their work, and, according to the evidence, this was the only practicable course. The architect did not include the omission to put in permanent posts among his reasons for declining to give a certificate. We do not think that the owner can take advantage of his own omission, nor justly complain because work was not done, when the failure to do it was owing to himself. (*Smith v. Norris*, 120 Mass. 58; *Welch v. Sherer*, 93 Ill. 64; *Charnley v. Honig*, 74 Wis. 163.)

“The specifications required the contractors ‘to make and set in the partition back of each water-closet a four by ten inch ventilator.’ The trial judge found that these were not put in, but he refused to find that the partitions were not properly set and ready for the mason on that account. The specifications do not provide when the ventilators were to be put in, nor whether they were to be behind lath and plaster or behind wood. They were not a part of the partition, but were to be ‘set in’ it, presumptively after the partition was erected. Some witnesses testified that if they were put in and plastered over, the plaster, having no ‘clinch,’ would not adhere thoroughly, and that the proper way was to put them behind wood, so that they would be accessible, for repairs and other purposes, without tearing away the lath and plaster. Evidence was also given, without objection, to the effect that they should be put in after the masons had done their work of plastering the partitions. Other witnesses testified that they should be lathed and plastered over, so that they could not be seen, and

that this was the usual way. The architect was of this opinion, but he gave no such direction to the contractors and did not say so when he refused the certificate, nor allude to the ventilators in any way. This conflict in the evidence justified the finding of the trial court in favor of the lienors upon this subject, and its refusal to find as requested by the owner. Access to the ventilators was a matter of some importance, and in the absence of any provision in the specifications, or instruction from the architect, it was reasonable to conclude that the contractors had the right to put wood, instead of lath and plaster, over the open spaces in which the ventilators were to be placed.

"The observations already made apply to the other alleged omissions on the part of the contractors, none of which were specifically relied upon by the learned counsel for the owner, either in his oral argument or in his points.

"As the payments were to be made upon the certificate of the architect, his refusal to certify that the second installment was due is relied upon as a conclusive defense to the efforts of the lienors to enforce their claims in excess of the amount conceded by the owner to be due.

"According to the evidence of the contractors, they made four demands of the architect for a certificate that they were entitled to the second payment. On the occasion of the first demand he refused because the door-jambs were not set. Thereupon the contractors, although claiming that the door-jambs were not a necessary part of completing the house to the laying of the floors and the setting of the partitions, proceeded to set the door-jambs, when they again demanded a certificate, but the architect said that he would not issue one until the back piazza was up. The contractors insisted, that this was not required because it was outside of the house, but, notwithstanding, they put it up and laid the floors therein. When the certificate was next demanded the architect refused it because the piazza was not finished. They informed the owner of what they had done, and that the architect would not give a certificate, and asked him to pay them, but he refused, stating that he did not know anything about it, and that everything was left with the architect. A witness testi-

fied to a statement made by the architect, although the latter denied it, that in drawing the contract he had made the first and second payments too large, thus suggesting a personal reason for his persistent refusal. There was no request to find that the piazza was not finished. We think that the evidence warranted the finding, as made by the trial court, that the architect unreasonably withheld the certificate. While it may have been proper to require the piazza to be erected and the floor thereof laid, so that progress of erection should be uniform inside and outside of the building, it does not seem reasonable to require the piazza to be finished at a period when no part of the interior was finished. The second payment was earned when the floors were laid and the partitions set, ready for the masons. This did not include the completion of the back piazza, either by specific mention or because that work was necessary in order to do anything that was specifically mentioned. As the refusal of the architect was based upon an unreasonable requirement, it furnished no protection to the owner. (*Thomas v. Fleury*, 26 N. Y. 26; 15 Am. & Eng. Encyc. Law, 77.)

"The court refused to find, upon the request of the owner, that he had paid the contractors the sum of \$1,680 on account of said work. This included the first payment of \$1,500, which is admitted; the further sum of \$100, which it is not denied, was in fact delivered by the owners to the contractors, and orders to the amount of \$80 drawn by them and accepted by him. No controversy arises as to the payment of \$1,500, but it is claimed that the rest, \$180, was a loan and not a payment, and that the court is presumed to have so found. One of the contractors testified as follows: 'I think Mr. Sahagian gave us \$100 besides that payment of \$1,500, and he accepted orders for \$80, and he and I agreed on \$1,680; * * * I have received altogether * * * \$1,680, \$1,500 on the first payment and \$180 loaned to us. It was not credited to me on account on the second payment, but on account of the contract. That money, the \$180, was given to me by Sahagian as an accommodation, and had nothing to do with the payment at all.' The owner testified: 'I paid them \$100, and then I paid \$80. He brought an order from Mr. Hunt. The \$100 was

paid before the first payment. This was done, as James Stewart says, because he and I were very friendly.' Our attention has been called to no other testimony upon the subject. The statement of the contractor that he and the owner agreed on \$1,680 admits of no construction, except that they agreed on it as a payment. His subsequent statement that it was not credited on account of the second payment, but on account of the contract, does not vary the legal effect of the transaction, but confirms the theory of a payment on the contract. Any payment credited on the contract after the first must, of necessity, be applied on the second, or it cannot be applied at all, and the owner can get no benefit from it. When the witness characterized it as a loan, it is evident that he meant a loan or advance on account of the contract. We think that the evidence compels the conclusion of payment to the amount claimed, and that the learned trial court, amidst the confusion caused by the presentation of four sets of requests, each in behalf of a separate interest, inadvertently omitted to give credit for the entire sum actually paid.

"After examining all of the exceptions, we are of the opinion that upon the facts as found, together with those having the support of evidence that are presumed to have been found under the rule, the record presents no error calling for a reversal or modification, except the refusal to find just considered.

"The judgment should be reversed and a new trial granted, with costs to abide the final award of costs, unless the defendants Lawrence, who filed the last lien, and William H. Stewart, as assignee of Stewart & Edmunds for the benefit of creditors, stipulate, within thirty days, to reduce the amount of the recovery in their favor, respectively, by deducting therefrom the sum of \$180, with interest thereon from March 7, 1889, in which event the judgment as so modified should be affirmed, without costs in this court to any party."

Joseph F. Daly for appellant.

John H. Ferguson for plaintiff, respondent.

R. E. Prime for defendants, respondents.

VANN, J., reads for reversal, unless a stipulation for a reduction of the recovery is made, and for a modification if stipulation is made, as specified in the opinion.

All concur.

Judgment accordingly. _____

JEREMIAH CALLAGHAN, Respondent, *v.* THE DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COMPANY et al.,
Appellants.

(Argued March 9, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 29, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Louis Marshall for appellants.

M. E. Driscoll for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

CHARLES E. HUME, Respondent, *v.* THE GEORGE C. FLINT
COMPANY, Appellant.

(Argued March 10, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made March 6, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and also affirmed an order denying a motion for a new trial.

E. Countryman for appellant.

John H. V. Arnold for respondent.

Agree to affirm; no opinion.

All concur, except HAIGHT, J., not voting.

Judgment affirmed.

ALICIA MAUD BLISS, Appellant, *v.* GRACE F. WEST et al.,
Respondents.

(Argued March 10, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

F. H. Cowdrey for appellant.

G. A. Seixas for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

HENRY M. BURTIS, Respondent, *v.* JOHN CASSIDY, Appellant.

(Submitted March 10, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made October 29, 1890, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Joseph A. Burr, Jr., for appellant.

Jacob Brenner for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ANTON NOWAK, Appellant, v. GEORGE F. WALLER et al.,
Respondents.

(Submitted March 11, 1892; decided March 25, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 12, 1890, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Circuit, and also affirmed an order denying a motion for a new trial.

John R. Reid for appellant.

Timothy M. Griffing and *Wilmot M. Smith* for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

CHLOE E. PERSONS et al., Appellants, v. LUCY M. SEARGENT,
Impleaded, etc., Respondent.

(Argued March 11, 1892; decided March 25, 1892.)

APPEAL from judgment of the Supreme Court in the fourth judicial department, entered upon an order made September 9, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Watson M. Rogers for appellants.

S. C. Huntington, Jr., for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ENOCH MORGAN'S SONS' COMPANY, Appellant, v. GEORGE
WALDO SMITH et al., Respondents.

(Argued March 7, 1892: decided April 19, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made December 2, 1889, which affirmed a judgment in favor of defendants entered upon a verdict.

The following is the opinion in full:

"This appeal presents the question of the sufficiency of proof to establish a counter-claim asserted by the defendants against the plaintiff.

"The counter-claim arose upon the alleged performance of a contract between the parties, which was contained in a letter addressed by the plaintiff to the defendants, the material part of which is as follows:

'NEW YORK, *April* 23, 1887.

'MESSRS. SMITH & SILLS:

'GENTLEMEN—Your purchase of Sapolio during the year 1886 were equivalent to eight hundred and ninety cases of one-half gross each. In order to more fully interest you and encourage a larger sale, we will pay you * * * one dollar for each half-gross case, and fifty cents for each quarter-gross case, you may purchase for direct shipment during the year 1887 in excess of the number of cases mentioned above, provided you sign and strictly adhere to the terms of the enclosed agreement, and provided, also, that your purchases are only for your legitimate wants in the ordinary course of your dealings with the retail trade.

'Yours truly,

'ENOCH MORGAN'S SONS' CO.'

"The agreement referred to, and which was signed by the defendants, provided that they would not sell, nor allow any of their employes to sell, any of the sapolio for less than \$4.50 per case for half-gross cases and \$2.25 per case for quarter-gross cases, and that they would not, upon sales of such article, give longer time or greater discount for cash than generally allowed by them on other goods.

"The reply, by appropriate allegations, put in issue the performance of the contract, and it was, therefore, incumbent upon the defendants to establish its performance on their part.

"This they assumed to do, and upon the close of their evidence the plaintiffs moved to dismiss the counter-claim on the ground that they had failed to show compliance with the condition of the agreement sued on. This motion was denied, and the exception taken presents the question for review.

"We are of the opinion that this ruling was erroneous. There was no waiver of the condition of the contract by the plaintiffs in the pleadings or upon the trial and the defendants could not recover without proving full performance of the contract on their part.

"It is not every sale of a case of sapolio that would entitle them to receive from plaintiffs the sum specified.

"To entitle them to recover it was essential to prove a purchase from plaintiffs made necessary by their wants in the course of their dealing with the retail trade and a sale thereof for a price not less than that specified either for cash or upon terms of credit generally allowed by them upon the sale of other goods.

"The proof failed to show a compliance with their condition. It warranted the conclusion that defendants had purchased from plaintiffs five hundred and eight one-half gross cases in excess of the quantity purchased in 1886, and that the same had been sold in their ordinary dealings with the retail trade. But nothing more. There was no evidence as to the price at which the goods were sold or as to the terms of the sales.

"These were matters essential to their right to recover and without some evidence upon them no cause of action was established.

"The respondent refers us to two letters written by defendants to the plaintiff, forming a part of the correspondence between the parties in relation to the performance of the contract. These letters contain statements to the effect that defendants had kept the contract in good faith and that they had sold all the sapolio at full price without reduction or rebate whatever.

"A party's own letter cannot be evidence in his own behalf of the facts therein stated when they are not part of the *res gestæ*. These letters were not, therefore, proof of the performance of the contract and had no other probative force than to show that the defendants claimed that they had performed the agreement.

"The facts in reference to the sales were necessarily within the defendants' knowledge. They must have known who their customers were and the times and prices for which the sapolio was sold, and while we do not hold that it was essential for them to prove the details of every sale in order to make out their *prima facie* case, it was essential that the proof should be sufficient to enable the jury to determine as a fact that the sales were in accord with the terms of the contract.

"The judgment should be reversed and a new trial granted."

Charles Steele for appellant.

James A. Seaman for respondents.

BROWN, J., reads for reversal and a new trial.

All concur, except LANDON, J., dissenting, and VANN, J., not voting.

Judgment reversed. _____

HERMAN HAHLO et al., Respondents, v. HUGH J. GRANT,
Sheriff, etc., et al., Appellants.

(Argued March 14, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 23, 1890, which affirmed a judgment in favor of plaintiffs, entered upon a verdict and affirmed an order denying a motion for a new trial.

David McClure for appellants.

Morris J. Hirsch for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

BENJAMIN COLLINS, Appellant, *v.* LONG ISLAND CITY et al.,
Respondents.

THIS case involves the same questions as and was argued
and decided with *Collins v. L. I. City* (*ante*, page 325).

GEORGE J. GROSSMAN, Respondent, *v.* EPHRAIM M. KANTRO-
WITZ et al., Appellants.

(Argued March 16, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme
Court in the first judicial department, entered upon an order
made October 24, 1890, which modified and affirmed as modi-
fied a judgment in favor of plaintiff entered upon the report
of a referee.

S. F. Kneeland for appellants.

Abram Kling for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

EDWARD AVERY, Respondent, *v.* THE NEW YORK MUTUAL
INSURANCE COMPANY, Appellant.

(Argued March 17, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Superior
Court of the city of New York, entered upon an order made
June 27, 1890, which affirmed a judgment in favor of plain-
tiff entered upon a verdict and also affirmed an order denying
a motion for a new trial.

John Berry for appellant.

John A. Mapes for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM JENKINS, Appellant, v. THE MAHOPAC IRON ORE
COMPANY, Respondent.

(Argued March 18, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 6, 1890, which overruled defendant's exceptions and affirmed a judgment in its favor entered upon a decision of the court on trial at Circuit, and also affirmed an order denying a motion for a new trial.

George W. DeLano for appellant.

William C. Holbrook for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN THOMPSON, Respondent, v. P. SANFORD ROSS et al.,
Appellants.

(Argued March 18, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 8, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

R. D. Benedict for appellants.

J. Edward Swanstrom for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE TOWN OF SOUTHAMPTON, Respondent, *v.* EDWARD POST,
Appellant.

(Submitted March 22, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 11, 1889, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Timothy M. Griffing and *James H. Tuthill* for appellant.

Thomas Young and *Thomas F. Bisgood* for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CLARA L. DOTY, Respondent, *v.* THE NEW YORK STATE MUTUAL
BENEFIT ASSOCIATION of Syracuse, N. Y., Appellant.

(Argued March 22, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 11, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

T. K. Fuller and *Charles H. Peck* for appellant.

Isaac D. Garfield for respondent.

Agree to affirm; no opinion.

All concur, except VANN, J., not voting.

Judgment affirmed.

ILLINOIS WATCH COMPANY et al., Respondents, v. MAY L.
PAYNE et al., Impleaded, etc., Appellants.

(Argued March 23, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 21, 1890, which modified, and affirmed as modified, a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

L. Laflin Kellogg for appellants.

Franklin Bien for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

THE STATE OF NEW YORK NATIONAL BANK, Appellant, v.
SAMUEL D. COYKENDALL, Respondent.

(Argued March 24, 1892; decided April 19, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1890, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial.

F. L. Westbrook for appellant.

A. T. Clearwater for respondent.

Agree to affirm ; no opinion.

All concur, except PARKER and LANDON, JJ., not sitting.

Judgment affirmed.

CATHERINE COWAN, Respondent, *v.* THE THIRD AVENUE
RAILROAD COMPANY, Appellant.

(Argued April 18, 1892; decided May 3, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 18, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict.

William H. Rand, Jr., for appellant.

James A. Briggs for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

HENRY OBERLIES, Appellant, *v.* BALTHASAR BULLINGER,
Respondent.

(Argued April 18, 1892; decided May 3, 1892.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made October 23, 1890, which denied a motion for a new trial, ordered judgment for defendant on nonsuit and overruled exceptions ordered to be heard at General Term in the first instance.

June 2, 1887, the parties to this action entered into a written contract, by which the plaintiff agreed to build for \$3,050 a dwelling for the defendant, and complete it on or about November first of that year. The defendant paid \$1,900 on the contract, and this action was brought to recover \$1,150, the remainder of the contract price, and \$73.75 for extra work claimed to have been done. The action was defended on the ground that the building was not constructed in accordance with the plans and specifications. At the close of the plaintiff's case the defendant moved for a nonsuit on the ground "that the plaintiff has not shown facts sufficient to constitute

a cause of action, and especially he has not shown performance of the contract." The motion was granted and the plaintiff duly excepted. The plaintiff asked to go to the jury upon the question of substantial performance, which was denied, and exception taken. The plaintiff also asked to be permitted to go to the jury upon his right to recover the value of the extra work claimed to have been done in changing the front stairway, for which he claimed \$48. This request was denied and an exception taken. These exceptions were ordered to be heard in the first instance at General Term, where they were overruled and a judgment ordered for the defendant, with costs, upon the order of the Circuit.

The following is the opinion in full :

"The contract contains this provision :

"*Fourth.* Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Oscar Knebel, architect, employed by the party of the second part (defendant), to superintend the construction of said building, with a view to the due execution of the work on the part of the party of the first part (plaintiff), and his decision shall be final and conclusive, but should any dispute arise as to the true value of the alterations, deviations, additions or omissions in the work or materials hereby contracted for, the value in dispute shall be determined by two competent persons, one employed by the party of the first part and the other by the party of the second part, and they shall have power to name an umpire, whose decision shall be binding on all parties.' The defendant seeks to uphold the nonsuit on the ground that an arbitration to settle the amount due under the contract was a condition precedent to the plaintiff's right to recover and that having failed to show that an arbitration has been had, or that he has offered to arbitrate he was not entitled to recover. The answer to this position is that this question was not raised on the trial. The contest at Circuit was whether there was a deviation from the plan, and whether the work and materials were of the kind and quality called for by the contract. No other questions are suggested by the record and had the defendant raised this objection the plaintiff might have shown that the defendant

had refused to arbitrate, or that an arbitration had been waived. Having regard to the course of the trial we do not think the defendant's motion for a nonsuit raised this question.

"The plan, which was a part of the contract, required that the ridge of the roof to the portion of the house known as the back or rear addition should be eleven feet above the floor of the attic. By an error in construction it was but ten feet and seven inches above the floor, five inches lower than called for by the plan. The undisputed evidence shows that this was caused by a mistake in measurement and was not discovered by either party, or by the architect, until after the house had been completed. The architect employed by the defendant was called as a witness by the plaintiff and he testified that after the plaintiff claimed that the contract was performed he made two personal inspections of the building. He said: 'The general work of the house was satisfactory to me, the character was in keeping with the specifications and the contract in every respect with the exception of some minor details which I pointed out to the contractor and had him remedy them. I went there the third time after that was remedied and give him that certificate (the one in evidence) which I consider informal.' 'Q. Do you know whether Mr. Oberlies remedied all the defects which you pointed out and wanted corrected? A. He did at the time, with the exception of the roof. I saw they were all remedied; in regard to the back roof I found it lower than the drawings showed, about five inches; that is, of course, as it stands and not five inches on the plans; five inches in reality; it shows the rear portion of the roof five inches lower; it lowers the interior of the attic five inches. * * * I don't know of any use to which an attic five inches higher than this one could be put, which is prevented by this deficiency in height. Q. What effect, if any, would this deficiency have in height, or this roof as it now stands, upon the appearance of the building; in other words, what is the appearance of the building as it stands to-day? A. This roof has not detracted * * * the house looked finished in every respect outside * * * it was built symmetrically; I consider it as symmetrical; I think it was as symmetrical then as it would have been if that roof had

been five inches higher; I don't think this roof is any weaker in any respect than it would be if it were five inches higher.'

"All of the witnesses testified that this deviation in the plan did not affect the exterior appearance of the house, which was in every respect as useful and valuable as though the deviation had not been made. Upon this question there was no conflict in the evidence and this was the principal defect in the construction alleged as a total defense to this action. It was alleged that there were some other minor defects in the construction but the evidence given on the part of the plaintiff did not show that they were so material that the court was authorized to hold as a matter of law that the contract had not been substantially performed. It may well be that when the evidence of the defendant shall be produced that it will appear that this contract was not substantially performed, but as the evidence stood, we think the court erred in nonsuiting the plaintiff and that for this error the judgment should be reversed and a new trial granted with costs to abide the event.

Abraham Benedict for appellant.

Walter S. Hubbell for respondent.

Per Curiam opinion for reversal and new trial.

All concur

Judgment reversed. _____

JOHN AVERY, Appellant, v. MANLY B. MATTIOE, Respondent.

(Argued April 21, 1892; decided May 6, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 13, 1890, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

Sidney Crowell for appellant.

John A. Griswold for respondent.

Agree to affirm; no opinion.

All concur, except LANDON, J, not sitting.

Judgment affirmed.

NAOMI DUNSBACH, Respondent, *v.* WILLIAM H. HOLLISTER,
Appellant.

(Submitted April 21, 1892; decided May 6, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 1, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

Doyle & Fitts for appellant.

J. F. Crawford for respondent.

Agree to affirm; no opinion.

All concur, except LANDON, J., not sitting.

Judgment affirmed.

WILLIAM WILLS, Appellant, *v.* THE UNION BOTTLING COM-
PANY, Respondent.

(Argued April 21, 1892; decided May 6, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 27, 1890, which affirmed a judgment in favor of defendant entered upon a verdict, and also affirmed an order denying a motion for a new trial.

N. E. Warren for appellant.

Andrew Dutcher for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THOMAS COLLINS, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued April 22, 1892; decided May 6, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

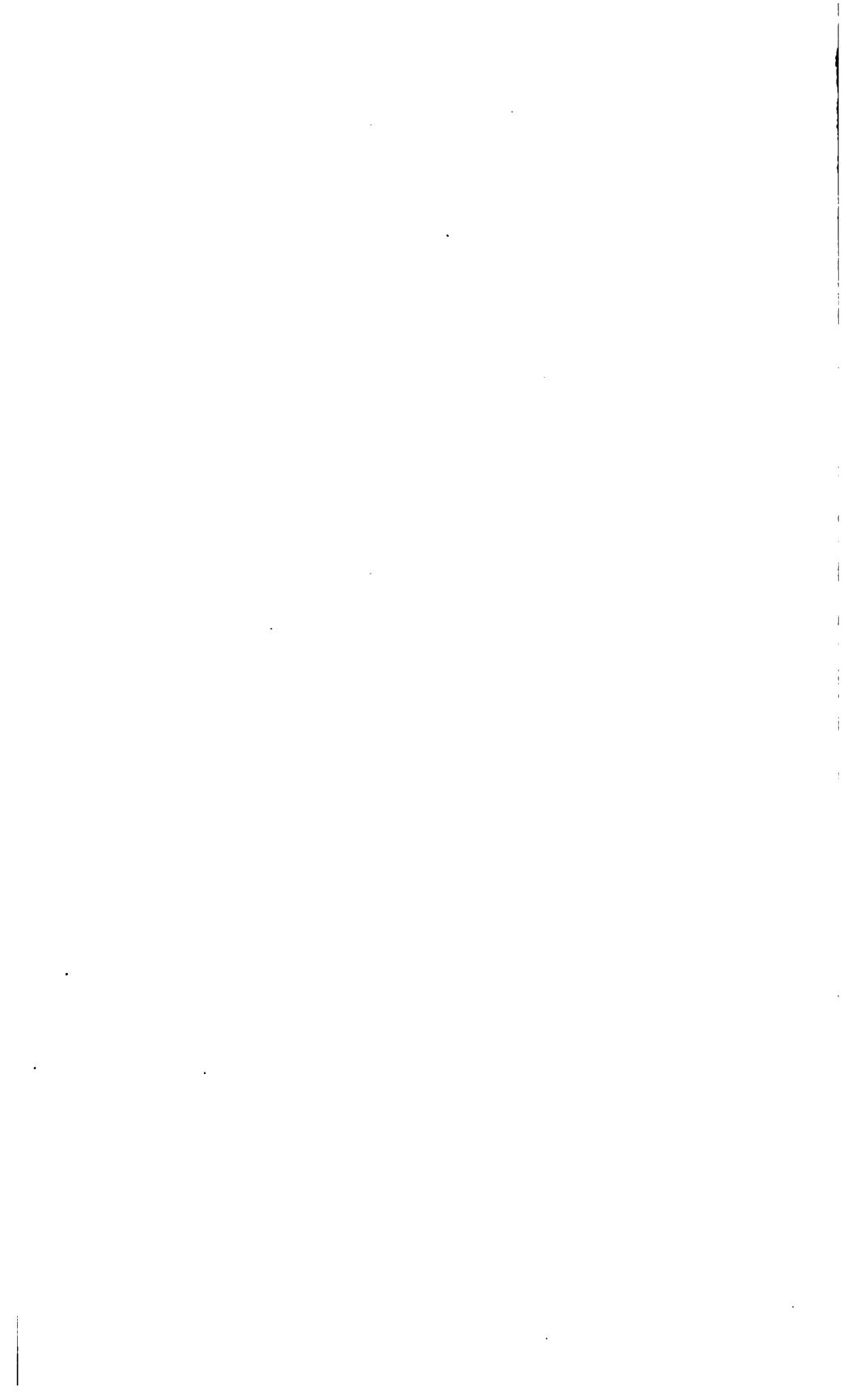
James F. Gluck for appellant.

Frank Brundage for respondent.

Agree to affirm ; no opinion.

All concur, except FOLLETT, Ch. J., dissenting, and HAIGHT, J., not voting.

Judgment affirmed.



INDEX.

ACCOUNTING.

1. The complaint herein alleged that plaintiff J. acquired title to certain premises subject to a mortgage, as devisee under the will of N., who died in 1880, which will was admitted to probate in February, 1880; that in May, 1880, defendant B., who then owned the mortgage, brought an action to foreclose it, fraudulently omitting to make J. a party, and by perjury obtained an adjudication that there was due thereon \$5,869.87, when in fact there was only about \$1,000 unpaid; that the purchaser on the foreclosure sale fraudulently executed a mortgage on the premises to defendant G., which was foreclosed without making J. a party, and the premises bid off and conveyed to C., the attorney of record for G. in that action; that several of the defendants who were named, including G., collected rents exceeding the amounts due on both mortgages. Judgment was demanded that the pretended mortgage to G. be canceled and stricken from the records; that defendants account for the rents and profits received by either of them; that plaintiffs be at liberty to redeem upon payment of whatever was found due, etc. Defendant G. demurred on the ground that two causes of action were improperly united, and that as against her, it did not state facts sufficient to constitute a cause of action. *Held*, untenable; that but one cause of action was stated, and that sufficient facts were stated to entitle plaintiffs, as against G., to an accounting. *Johnson v. Golder*. 116
2. In an action to set aside a general assignment as fraudulent and for an accounting, actual fraud as against creditors of the assignor, both on his part and that of the

assignee, was proved and found. The interlocutory judgment adjudged the assignment void, appointed a receiver and required defendant to deliver to him all of the assigned property, and to pay over all the income, profits, etc., received therefrom "less any lawful disbursements made or incurred by said assignee." The assignor had been engaged in a manufacturing business. On the accounting the referee allowed the assignee the amount paid by him to the workmen in the factory, who were preferred, for work done prior to the assignment, and the additional value given to the stock by working it after the assignment, but refused to allow expenditures incurred by the assignee for appraising stock, payment for legal services, rent of factory, labor, etc. *Held*, no error; that the provision in the judgment did not extend the right to credits for disbursements beyond those which would be treated as lawful without its aid; and that as the disbursements so made were in furtherance of the fraudulent scheme, and by virtue of power dependent upon title or right of possession, they were unlawful. *Smith v. Wise*. 172

3. The assignment preferred certain notes made by the assignor and indorsed by a firm, of which the assignee was a member; these notes were paid by the assignee before the commencement of the action. *Held*, that while the assignee was to be treated as never having had title, and, therefore, as against creditors, no rights dependent upon title were available to him, as the payment of the notes was made by direction of the assignor when he was at liberty to make it, and when the direction was operative, the assignee was entitled to be allowed the sum paid. *Id*.

ADMISSIONS AND DECLARATIONS.

While statements of a person injured, expressive of his present condition, made to a physician for the purpose of treatment, may be proved in his behalf, statements made as to the past, *i. e.*, as to pains which he had suffered or disabilities he had labored under, are not competent, and error in receiving such statements is not cured by testimony on his part that such statements were true. *Davidson v. Cornell.* 228

ADVERSE POSSESSION.

— *When purchaser and occupant of a cemetery lot may claim title by adverse possession.*
See Conger v. Treadway. 259

AGREEMENT.

See CONTRACT.

ALBANY (CITY OF).

By various statutes in relation to the city of Albany, it is made lawful for the common council "to make by-laws and inflict reasonable penalties to enforce the same, for regulating and keeping in repair the docks and slips within the city, and to prevent the same and the river opposite thereto from being in any manner obstructed" (§ 19, chap. 153, Laws of 1801), and that body is constituted and declared commissioners of highways with power to pass ordinances, among other things, "to prevent all obstructions in the river near or opposite" the city wharves or docks. (§ 15, chap. 185, Laws of 1826.) The common council of the city passed an ordinance declaring that whenever any vessel is sunk at any dock or anywhere in the Hudson river opposite the city, it shall be the duty of the street commissioner, under the direction of the mayor, to give notice to the owner to remove it, and if the notice is not complied with, making it lawful for that officer to take possession of the vessel, remove and sell

it, etc. Plaintiff's complaint alleged in substance that he was the owner of a dock in that city; that a loaded canal boat sank at the dock, obstructing its use; that a written notice thereof was served on the mayor, who gave written directions to the street commissioner to remove it; that officer notified the owner, but declined to remove it himself, or to do anything more in the matter, whereupon plaintiff caused the boat to be removed. Plaintiff asked to recover the expenses of such removal and his damages. Upon demurrer to the complaint, *held*, that assuming said statutory provisions were not repealed by the amended charter of 1883 (Chap. 298, Laws of 1883), which in prescribing the powers to pass ordinances, omits all mention of the river opposite the city, the complaint failed to state a cause of action; that as no duty in reference to the matter was imposed upon the city by the statute, no liability existed: (1) As by the said charter of 1883 (§ 44, tit. 3) it is provided that the city shall not be liable for a failure to enforce any ordinance; (2) As the statutes prescribe that the city shall provide for the enforcement of its ordinances by fines and penalties, and so, that portion of said ordinance which authorized the sale of the vessel, or its loading, thus creating a forfeiture, was invalid. *Coontley v. City of Albany.* 145

ALIENS.

1. Under the provision of the act of 1874 (Chap. 261, Laws of 1874), amending the act of 1845 (Chap. 115, Laws of 1845), in reference to aliens taking and holding lands in this state, which provides that if an alien resident, or a naturalized or native citizen, "has died or shall hereafter die" holding a conveyance of lands in the state, purchased by such person, and "leaving persons who would answer the description of heirs," such persons, whether citizens or aliens, may take and hold the lands as heirs, etc., the state surrendered its title to lands acquired by escheat previous to the passage of the act, of which it had not before

that time assumed in any manner to make disposition, where the person to whose title the state so succeeded, died leaving alien heirs. *Wainwright v. Low.* 313

2. S. died in 1871, intestate, seized of certain real estate; she left the plaintiff, an alien, her only heir at law. By an act passed in 1876 (Chap. 184, Laws of 1876), the state released its right and interest in the lands to A., the husband of S., with the proviso, however, that nothing therein contained should "affect the right in said real estate of any heir at law." Before the passage of the act of 1874, no proceeding for escheat had been taken by the state. The trustee having died, upon petition of A., a new trustee was appointed by the court, with directions to convey the premises to A., which was done. In an action of ejectment, defendant claimed title under said conveyance to A. *Held*, that upon the passage of said act of 1874, the title vested in plaintiff, which title was not affected by the act of 1876; that, therefore, A. acquired and conveyed no title or interest by his deed; and that judgment was properly directed for plaintiff. *Id.*

AMENDMENT.

— *An amendment of a complaint which in effect makes an entire change of the cause of action, may not, if objected to, be made on trial.*
See *Freeman v. Grant.* 22

ANTE-NUPTIAL AGREEMENT.

1. By an ante-nuptial agreement, S., in contemplation of the marriage, conveyed to a trustee certain lands, the trustee to pay to her the rents and profits, or at her election to permit her to hold and use the lands during her life, and upon her death to convey them as she by deed, appointment or will, "should order, direct or appoint." S. retained possession of the premises until her death. *Held*, that the ante-nuptial conveyance did not create a trust within the meaning of the Statute of Uses and Trusts (1 R. S. 728, § 55), as the power of

the trustee to receive and apply the rents and profits was dependent on the election of S., and she exercised the right reserved by her to herself take and hold the property; that no title vested in the person named as trustee (1 R. S. 727, § 47; *Id.* 728, § 49; *Id.* 729, § 58); and that, therefore, the premises were held and owned by S. at her decease. *Wainwright v. Low.* 313

2. S. died in 1871, intestate and without having executed an appointment or deed as prescribed in the ante-nuptial agreement. She left the plaintiff, an alien, her only heir at law. By an act passed in 1876 (Chap. 184, Laws of 1876), the state released its right and interest in the lands to A., the husband of S., with the proviso, however, that nothing therein contained should "affect the right in said real estate of any heir at law." Before the passage of the act of 1874, no proceeding for escheat had been taken by the state. The trustee having died, upon petition of A. a new trustee was appointed by the court, with directions to convey the premises to A., which was done. In an action of ejectment, defendant claimed title under said conveyance to A. *Held*, that upon the passage of said act of 1874, the title vested in plaintiff, which title was not affected by the act of 1876; that, therefore, A. acquired and conveyed no title or interest by his deed; and that judgment was properly directed for plaintiff. *Id.*

APPEAL.

1. While in some cases the Court of Appeals may assume the existence of a fact in order to affirm a judgment, this cannot be done when the evidence in regard to it is conflicting and the trial court has not been requested to determine the fact either way. *Hollister v. Mott.* 18
2. Where, upon the trial of an action before a referee, motions by defendant for a dismissal of the complaint were made before the taking of any evidence and after plaintiff rested, which were not passed upon by the referee, he reserving his

decision, and thereafter evidence was introduced by defendant, and the case submitted to the referee without a renewal of the motions or calling for a decision thereon, and subsequently the referee made his report, dismissing the complaint without any findings of fact, or requests to make any such findings, *held*, that the judgment was not reviewable here, because of the absence of findings required by the Code of Civil Procedure (§ 1022). *Gilman v. Prentice*. 488

8. An omission of the averment in the complaint required by the provision of the Code of Civil Procedure (§ 549) authorizing the arrest of a defendant in an action for money received, that the money was received in a fiduciary capacity and forbidding a recovery unless the allegation is proved, may not be taken advantage of for the first time upon appeal; the question must be raised upon the trial. *Moffatt v. Fulton*. 507

— *Evidence improperly received on trial may not be considered here for the purpose of reversal.*

See Brady v. Mayor, etc. 415

— *When exceptions insufficient to preserve question on appeal.*

See Mitchel v. M. E. R. Co. (Mem.) 552

ARREST.

1. An omission of the averment in the complaint required by the provision of the Code of Civil Procedure (§ 549) authorizing the arrest of a defendant in an action for money received, that the money was received in a fiduciary capacity and forbidding a recovery unless the allegation is proved, may not be taken advantage of for the first time on appeal; the question must be raised upon the trial. *Moffatt v. Fulton*. 507
2. An express averment that the money was received in a fiduciary capacity is not necessary; a statement of facts showing that it was so received is sufficient, and is the proper pleading (*PARKER, J., dissenting*). *Id.*

3. Plaintiff's complaint alleged in substance that he intrusted his two promissory notes to the defendants, as his agents, to return one with certain explanations and to procure the other to be discounted and remit the net proceeds to him; that they procured both to be discounted, received the proceeds in trust to pay the same to plaintiff, but refused to pay them over on demand and converted them to their own use. The facts proved on the trial were substantially as alleged, with the exception that it appeared defendants were authorized to procure the discount of either of the notes and to return the other with the net proceeds of the one discounted. *Held* (*PARKER and BRADLEY, JJ., dissenting*), that the averments in the complaint and the proof were sufficient to authorize a judgment enforceable against the person of the defendant, upon whom alone the summons in the action was served. *Id.*

ASSESSMENT AND TAXATION.

1. Under the provision of the act of 1886 (§ 15, chap. 656, Laws of 1886), confirming "with interest thereon allowed by law" unpaid taxes in Long Island City, which were laid or levied prior to 1883, interest was properly chargeable on such taxes. *Collins v. Long Island City*. 321
2. In an action to set aside certain tax sales of lands in said city for unpaid taxes for the year 1883, it appeared that the lands were unoccupied and were owned by a non-resident. The name of the owner was inserted in the assessment-roll. It was claimed by plaintiff that this rendered the assessment void. *Held*, untenable; that as under the provision of the charter of said city (§ 6, tit. 6, chap. 461, Laws of 1871), giving to the city assessors all the power of town assessors, this exception is made: "That lands of non-residents shall not be separated from other assessments," and as the lands were properly placed in the roll, and every act stated necessary to make a valid assessment, the insertion of the

owner's name was surplusage, which did not affect the validity of the assessment. *Id.*

3. *It seems* that if the statement of the owner's name had the effect to initiate a personal charge against him, his remedy is by proper proceedings to set aside the tax as against him, to restrain its collection, or to recover damages in case it has been enforced. *Id.*

ASSIGNMENT.

The provision of the act providing for the incorporation of certain business corporations, which declares (Chap. 611, Laws of 1874) that no transfer of stock "shall be valid for any purpose whatever," except to render the transferee liable for debts, until it shall have been entered in the stock transfer-book required to be kept by the company, is only for its protection and does not operate to prevent the passing of the entire legal and equitable title in the shares, as between the parties, by the delivery of the certificate with assignment and power of transfer. (BRADLEY, J., dissenting.) *C. N. Bank v. Colwell.* 250

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. In an action to set aside a general assignment as fraudulent and for an accounting, actual fraud as against creditors of the assignor, both on his part and that of the assignee, was proved and found. The interlocutory judgment adjudged the assignment void, appointed a receiver and required defendant to deliver to him all of the assigned property, and to pay over all the income, profits, etc., received therefrom "less any lawful disbursements made or incurred by said assignee." The assignor had been engaged in a manufacturing business. On the accounting the referee allowed the assignee the amount paid by him to the workmen in the factory, who were preferred, for work done prior to the assignment, and the additional value given to the stock by work-

ing it after the assignment, but refused to allow expenditures incurred by the assignee for appraising stock, payment for legal services, rent of factory, labor, etc. *Held*, no error; that the provision in the judgment did not extend the right to credits for disbursements beyond those which would be treated as lawful without its aid; and that as the disbursements so made were in furtherance of the fraudulent scheme, and by virtue of power dependent upon title or right of possession, they were unlawful. *Smith v. Wise.* 172

2. The assignment preferred certain notes made by the assignor and indorsed by a firm, of which the assignee was a member; these notes were paid by the assignee before the commencement of the action. *Held*, that while the assignee was to be treated as never having had title, and, therefore, as against creditors, no rights dependent upon title were available to him, as the payment of the notes was made by direction of the assignor when he was at liberty to make it, and when the direction was operative, the assignee was entitled to be allowed the sum paid. *Id.*
3. The provision of the act in relation to assignments for the benefit of creditors (§ 2, chap. 466, Laws of 1877, as amended by chap. 294, Laws of 1888), which requires the assignor to state in the assignment "the residence and the kind of business carried on by such debtor at the time of making the assignment and the place at which such business shall then be conducted, and, if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor," is directory merely, not mandatory; the object of such provision being to identify the assignor and prevent his being confounded with others bearing the same name. *Dutchess Co. M. Ins. Co. v. Van Wageningen.* 398
4. Where, therefore, in an action to set aside an assignment which stated the residence of the assignor and assignee to be the town of M.,

giving the county and state, but containing no statement of the kind or place of business of the assignor, it appeared that the assignor had resided for forty years and kept a country store at S., a hamlet, not incorporated as a village, in said town, and was known to almost every person of mature age there, and there was no other person of the same name residing in the town, *held*, that the omission did not render the assignment void, the description being sufficient to identify the assignor. *Id.*

5. An intentional withholding and secreting by the assignor of assets of a substantial value from the possession of the assignee, is a fraud upon the rights of creditors of the assignor, and renders a general assignment for the benefit of creditors void. *Coursey v. Morton.* 556
6. Every party must be deemed to have intended the natural and inevitable consequences of his own acts, and so, when they are voluntary and necessarily operate to defraud others, he will be deemed to have intended the fraud. *Id.*

ATTACHMENT.

1. By virtue of a levy under an attachment brought by plaintiffs, the sheriff received \$900. Defendants, as subsequent lienors, moved to vacate the attachment and procured an order restraining the sheriff from paying over the money to plaintiffs. The motion to vacate was granted and the sheriff thereupon paid over the money so received to defendants. Upon appeal the order vacating the attachment was reversed and the motion denied. Plaintiffs, pending the appeal, recovered judgment in their attachment suit, an execution thereon was returned wholly unsatisfied and their judgment remains unpaid. *Held*, that an action as for money had and received was maintainable to recover the moneys so paid to defendants; that the right of action was not affected by the fact that at the time the money was paid over to defendants, plaintiffs had only

a lien upon it; that while the erroneous order was a protection to the sheriff, it was not such to defendants; that they having received the money with knowledge of the facts, and that if the order by virtue of which they received it should be reversed, plaintiffs would be entitled to it, a promise of restitution would be implied, running to plaintiffs, who could enforce it without the intervention of the sheriff. *Haebler v. Myers.* 363

2. L. conveyed certain premises to S. T. and H. by deeds absolute on their face in pursuance of an agreement, by which she contracted to so convey as security for a loan which the grantees agreed to and did make; said loan to be for a period not exceeding one year from the date of the deed. Upon repayment of the loan with the interest the grantees agreed to reconvey; but in case it was not repaid within the year, the grantor agreed that the deed should become absolute and that the grantees, their heirs and assigns, should become the owners in fee simple absolute. The loan was not repaid within the year and thereafter the grantor surrendered possession of the premises to the grantees. Plaintiff levied upon the premises, by virtue of an attachment against L. as a non-resident, in an action wherein the summons was served by publication, obtained judgment by default, and issued execution thereon. In an action to have said deeds declared to be mortgages, and the premises subjected to the lien of the plaintiff's judgment, *held*, that plaintiff was entitled to the relief sought; that the deeds were mortgages; that the provision in the contract that if the loan was not repaid in the time specified they should become absolute conveyances, was ineffectual; that, as, therefore, the title remained in L., the lien by virtue of the attachment was valid, and the judgment and execution became a specific lien upon the land. *Macaulay v. Smith.* 524

3. The grantees before the attachment was issued executed a deed of the premises to the defendant,

the N. Y. B. Union. The grantee had no notice of the agreement; it admitted that a portion of the purchase-money, agreed by it to be paid, remained unpaid. *Held*, that said defendant could not maintain the defense; that it was not a *bona fide* purchase for value, as in order to sustain that relation, it must have paid all of the purchase-money; but that to the extent of its payments innocently made before notice of plaintiff's claim it was entitled to protection. *Id.*

ATTORNEY.

A cemetery was formerly owned by eleven persons as tenants in common; eight of them executed a power of attorney to G. and M. to sell and convey lots therein. M. did not act. G. undertook the execution of the power and continued to sell lots until he became disabled. Thereafter B. acted as attorney. In an action of ejectment to recover a lot in the cemetery, plaintiff claimed title under a sale in an action for partition between the original owners or their successors in title. Defendant claimed the lot by virtue of a purchase from G., and payment of part of the purchase-price to B., with agreement to pay the balance when the deed was delivered. It appeared that B. acted as attorney for a number of years, collecting money and paying the liabilities of the owner, and kept a book in which sales of lots were entered, in which was entered the sale of the lot to defendant. Defendant, immediately after his purchase, took possession of the lot, improved, graded and sodded it, buried seven persons therein and had been in possession for over twenty years. No deed was ever tendered to him. *Held*, that a verdict was properly directed for defendant; that while no express authority for B. to act as attorney was shown, the fact that he did so with the knowledge and consent of the owners necessarily raised the inference of authority, and defendant, therefore, was rightfully in possession, and if the contract for the purchase was to be considered as executory, he was entitled to possession until

the production and delivery to him of a deed; if not executory, he having entered under claim of title, acquired title by adverse possession. *Conger v. Treadway*. 259

BAILMENT.

1. While it is the duty of a creditor to whom property has been delivered as security for a debt, to use ordinary care for its protection and preservation, in determining what constitutes such care, the nature and value of the property and the means of protection possessed by the bailee, the relation of the parties and other circumstances must be considered. *Willets v. Hatch*. 41
2. Defendant indorsed and delivered to plaintiffs a warehouse receipt for certain wet salted calf skins as security for a call loan. In an action to recover on the loan defendant sought to counter-claim damages resulting from a deterioration of the calf skins while in the warehouse, alleged to have been caused by plaintiffs' neglect to care for them. It appeared that plaintiffs gave no personal attention to the skins while in the warehouse and exercised no supervision over them; that defendant had free access to them and frequently went to the warehouse and examined them. The skins were all piled together and the injury was caused by the heating of those in the center of the pile; this did not appear upon the surface of the pile. When defendant discovered that the skins were injured he called plaintiffs' attention to it and advised that they be re-salted or tanned; plaintiffs declined to do either; defendant also proposed to take them to his own warehouse and treat them. Plaintiffs did not consent, but suggested that defendant pay the debt and take the skins. *Held*, that while the legal title to the property was vested in plaintiffs and the warehousemen were their bailees, defendant had at least an equal interest in the preservation of the property, the bailment being for the mutual benefit of the parties, and no duty devolved upon the

former to cause it to be handled over and inspected; that plaintiffs were not required to permit defendant to take it to his own warehouse, and whether, under the circumstances, it was their duty to take some action for its preservation after being advised of its deterioration, for neglect to perform which they were liable, was properly submitted to the jury.

Id.

BETTING AND GAMING.

In an action to foreclose a mortgage executed by defendants, who were husband and wife, upon lands of the latter to secure their joint bond, the wife, who alone answered, alleged that part of the consideration of the bond and mortgage was a gambling debt due the mortgagee from the husband, and that, at the time of the execution of the bond and mortgage, the persons who would have been entitled to the mortgaged premises were the defendant's four children. The mortgagee died prior to the bringing of the action. Upon the trial the wife called the husband as a witness to prove the averment as to the consideration of the bond and mortgage; this was objected to and the testimony excluded on the ground that the witness was incompetent under the Code of Civil Procedure (§ 829) to testify to conversations or transactions between him and the deceased mortgagee. *Held*, no error; that the provisions of the Revised Statutes (1 R. S. 663, §§ 16, 17), upon which the defense was based which declare all things in action and securities, any part of the consideration for which is money won by playing at any game, to be "utterly void," except where the security affects real estate, when it shall be void as to the grantee, but shall inure to the sole benefit of the person entitled to the real estate in case the grantor or incumbrancer had died immediately upon the execution of the instrument, could not be construed as operative to transfer to the mortgagor's heirs title to the mortgage alone, leaving the bond valid in the hands of the obligee; that the mortgage being

merely an incident of the debt, the necessary effect of the statute is that the bond goes with it to the mortgagor's heirs, not absolutely, but only so far as necessary to give validity to the mortgage, and in case the amount of the debt exceeded the value of the land mortgaged, to the extent of the excess, the bond, if the defense was sustained, would be utterly "void," and as judgment was sought against the witness for any deficiency, he was directly interested in the event of the action. *Lutchford v. Lord*. 465

BILLS, NOTES AND CHECKS.

In an action upon a promissory note indorsed by defendant G., he answered to the effect that he held the legal title to certain letters patent owned by H., in order to effect a sale thereof for H.; that he sold an interest therein to the maker of the note, which was given in part payment; that at the request of H. the note was made payable to and was indorsed by G., in order simply to show that he had properly discharged the trust, and that the note was afterwards wrongfully diverted by H. The latter died before the trial. Upon the trial G. as a witness in his own behalf, was asked how it happened that the note was made payable to his order. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 828). *Held*, no error. *Sallade v. Gerlach*. 548

BOARD OF CLAIMS.

Upon a claim presented by P. against the state, the Board of Claims found that for many years P. was the owner and in possession of a dry-dock connected with a large basin upon the land of the state, opening into the Erie canal; across the mouth of the basin was maintained a bridge which was a part of the tow-path. The basin was filled with water from the canal and the surplus water of the canal flowed through P.'s land. The only means of communication between the dry-dock and the canal was

through the basin. The bridge was a swing bridge which had been erected by the claimant, with the consent of the state. In the spring of 1886, before the opening of navigation and when there was no water in the canal, the state removed the bridge, erected in its place a stationary bridge at the same level as the tow-path, offering to allow claimant to erect a new elevated bridge, which offer it did not appear he accepted. By reason of the change, P. was unable to move two boats which he had at that time, one in the basin and the other in the dry-dock. The court found that there was no liability on the part of the state. *Held*, error; that while the privilege enjoyed by P. was revocable at the will of the state, it included an obligation which the state could not withdraw from arbitrarily, when this would inflict severe loss upon P.; that the erection of the bridge by him and his allowance of the discharge of the surplus waters across his land constituted presumably in some measure the consideration for the privilege and, having permitted him to place his boats inside the bridge and thereafter withdrawn the water, the state was bound to afford him a reasonable opportunity to remove them; and that this obligation was not met by the offer to allow him to erect a new bridge. *Putnam v. State of New York*. 344

BOARDS OF TRADE.

1. A corporation organized under the act of 1877 (Chap. 228, Laws of 1877), providing for the organization of exchanges or boards of trade, may be dissolved by the court upon petition and consent of a large majority of its trustees and members, when it appears that it is doing no business, because of the diverse interests of its members, although the corporation is solvent and a minority of the trustees and members oppose the dissolution. (Code Civ. Pro. §§ 2419-2432.) *Hitch v. Hawley*. 212
2. When it appears that the interests of the stockholders of such a corporation are so discordant as

to prevent efficient management, and that a large majority of its trustees and members wish to wind up its affairs by a dissolution, the fact is established that the dissolution will be for the interests of the stockholders. *Id*.

BOUNDARIES.

1. Courses and distances mentioned in a conveyance must yield to the lines as actually and duly made by survey and described by marks and monuments, and while a line is given as running between two points will be presumed to be a straight one, where a reference is made to a survey which shows the line not to be a straight one, it will control. *Seneca Nation Indians v. Hugaboom*. 492
2. In an action of ejectment brought by plaintiff pursuant to the act of 1845 (Chap. 150, Laws of 1845), plaintiff claimed title under the treaty of 1802, between it and the Holland Land Company, and a deed executed in pursuance thereof, by which a portion of the south line of the lands reserved and released to said plaintiff is described as running west from a post a certain number of chains. The description closes with a statement that the lands described were to be held by plaintiff "in the same manner and by the same tenor as the lands reserved" by plaintiff by a treaty or convention entered into September 15, 1797. The description also referred to a meridian line at the east line of the tract and to artificial monuments placed at the corners. Under the treaty of 1797 a survey of the lands was made and the line plainly marked; the meridian line referred to in the treaty of 1802 was located by and the monuments placed under that survey. If the south line was to be taken as a straight one between the two points given, the land in question would be included in the reservation, but it was not included by the south line as shown by the survey. It also appeared that the south line as defined by the marks and monuments had been treated and designated as the southern boundary

from the earliest time within the memory of witnesses; that a fence had been erected upon it in 1829, which has since remained, and the lands south of it have been occupied by defendant and his predecessors in title. *Held*, that the evidence authorized the conclusion that the line as surveyed was the southern boundary of the reservation, and so sustained a verdict for defendant. *Id.*

8. Pursuant to an act of Congress of 1878 (Chap. 189), authorizing a re-survey of the reservation, a survey was made and duly approved; by this the south line in question was run as a straight line; plaintiff claimed under this survey. *Held*, that the survey so made did not, by changing the location of the line, have the effect to enlarge the reservation. *Id.*

BROKERS.

1. When, through the procurement of a broker employed to effect an exchange of real estate, a contract for the exchange has been agreed upon and entered into between his customer and the person with whom the exchange was to be effected, in the absence of any express agreement to the contrary the broker is entitled to his commissions. *Kalley v. Baker.* 1
2. It is no defense, therefore, to an action by the broker to recover his commissions, that the title of the other party to the contract, to the real estate agreed to be exchanged by him, is defective, and so that he is unable to perform his contract. *Id.*
3. In an action to recover for services, alleged to have been performed by plaintiff, as broker in procuring for defendant, at his request, a lease of property belonging to the city of New York, the power to lease which was in the board of commissioners of the sinking fund, the lease to be for the highest rental bid at public auction or by sealed bids after public advertisement (§ 170, chap. 410, Laws of 1882), plaintiff's evidence was to this effect: notices were posted

upon the premises that they were to be rented and reference was made therein to the comptroller for information, his purpose being in accordance with custom to procure a satisfactory offer before advertising. Plaintiff having obtained from the comptroller a proposed rental and a diagram, told defendant that he had the property to rent; they went together to see the comptroller and defendant made an offer which was accepted by that officer; defendant signed a memorandum which contained a provision that he "should pay all brokerage." Plaintiff was not employed or invited by the comptroller to procure offers. The amount of plaintiff's commission was stated by him; this defendant agreed to pay if he obtained the lease at his bid which he did. *Held*, that the evidence justified a finding of a consideration sufficient to support defendant's promise; and so, that a motion for a nonsuit was properly denied. *Myers v. Dean.* 65

4. Defendant's evidence was to the effect that plaintiff was not employed by and performed no services for him, and that his agency was in no sense a procuring cause in obtaining the lease. The court charged that if defendant stated to plaintiff before the lease was obtained that if he obtained the lease on his offer he would pay the commissions, plaintiff was entitled to recover. *Held*, error; as without some employment of or the performance of some service by plaintiff, there was no consideration for defendant's promise; and that the question of employment or service was for the jury. *Id.*
5. In an action by a real estate broker, living and doing business in Pennsylvania, to recover the compensation agreed upon for his services in effecting a sale for defendant, of certain lands in that state, the answer alleged in substance that under the statute laws of that state, all persons are forbidden from engaging in that business, without paying the prescribed fee and receiving a commission, and also are prohibited from recovering any compensation or commission for

such services, which statutes were referred to and the material provisions set forth, that plaintiff when he rendered the alleged services had not paid the fee, that the highest appellate court in that state had "in a proper case brought before it for review," decided that a real estate broker not having paid the fee or obtained a commission could not recover compensation. Upon demurrer to the answer, *held*, that it set forth facts sufficient to constitute a defense; that it was not essential to set forth the facts appearing in the case referred to, or to give its title or where reported; but the averment that the courts of Pennsylvania had in "a proper case" made the decision was sufficient to allow proof that a decision had been made decisive of this case. *Angell v. Van Schaick*. 187

6. Also *held*, that the validity of the contract was to be determined by the laws of Pennsylvania. *Id.*

BUILDING CONTRACTS.

1. By a building contract, the contractor agreed "to put in a sewer" to connect the houses to be erected with another sewer, and to make water connections. At the time of filing a mechanics' lien, there was nothing due under the contract, and all the payments called for by it had been made, except a sum due when the contract was completed. The contractor substantially performed the contract in other respects, but omitted to put in the sewer or to make the water connections, and the owner, after notice to the contractor, completed the work in these respects at an expense of \$180. The whole contract price was \$2,850. The owner had paid \$2,020. There was no provision in the contract that the owner should complete the work in case the contractor failed to do so, or any understanding that the former should proceed with the work, or any failure on his part to perform his obligations under the contract. In an action to foreclose the lien the court adjudged plaintiff to be entitled to a lien for the difference between the balance unpaid on the contract and the sum

expended by the owner to complete it. *Held*, that plaintiffs' right to recover depended upon the performance of the contract by the contractor; and that there was not a substantial performance by him. *Hollister v. Mott*. 18

2. An architect, who is also employed by the owner as his agent and representative in the erection of a building, has authority to consent to the substitution of material inferior to that called for by the contract. *Thomas v. Stewart*. 599
3. Where, under a building contract, by which the contract price is to be paid by installments, a demand is made by the contractor for the installment due, and payment is refused, the contractor may lawfully refuse to go on with the contract. *Id.*
4. Where, by a building contract, payments are only to be made upon certificates of an architect, the refusal of the architect to give to the contractors a certificate, as required, if based upon an unreasonable requirement, will furnish no protection to the owner. *Id.*

— As to what amounts to substantial performance of building contract. See *Oberlies v. Bullinger*. (Mem.) 598

BUSINESS CORPORATIONS.

1. Under the provision of the act of 1875 (§ 10, chap. 611, Laws of 1875), providing for the incorporation of certain business corporations, which requires that the directors of a corporation organized under it shall, at their election, "and throughout their term of office," be stockholders, whenever, and as soon as, a director parts with all beneficial interest in and control over his stock and causes the officers of the corporation to have knowledge of such fact, by request that a proper transfer be made on the corporate books, the statute operates to divest him of his office, and he ceases to be a director. (BRADLEY, J., dissenting.) *C. N. Bank v. Colwell*. 250

2. The provision of said act, declaring that no transfer of stock "shall be valid for any purpose whatever," except to render the transferee liable for debts, until it shall have been entered in the stock transfer-book required to be kept by the company, is only for its protection and does not operate to prevent the passing of the entire legal and equitable title in the shares, as between the parties, by the delivery of the certificate with assignment and power of transfer. (BRADLEY, J., dissenting.) *Id.*
3. In an action against the alleged directors of such a corporation to recover a debt of the corporation because of failure to file an annual report in January, 1886, as required by the act (§ 18), it appeared that defendant C., in November 5, 1885, assigned and delivered his certificate of stock, which was for eighty shares, to J., the secretary of the company, for the purpose of terminating his connection with the company. J. accepted the assignment, C. asked for the transfer-book, but the company had no such book at that time, and he was told it was not necessary. A few days later, a transfer-book having been obtained, the assignment was entered therein. J., however, issued a new certificate to himself for only seventy-five shares, and to C., without his knowledge, a certificate for five shares, which J. induced him to accept, but not with any understanding that he should be a director. The debt in question was incurred by the corporation in June, 1886. *Held* (BRADLEY, J., dissenting), that C. ceased to be a stockholder on his assignment of stock, and thereupon ceased to be a director, and so, was not liable. *Id.*
2. In 1867, the canal board passed a resolution, by its terms approving a map for the permanent appropriation "of the Port Byron water power on the Owasco outlet for the feeder to the Erie canal," and declaring that "the water and lands necessary for said feeder are hereby permanently appropriated." The owners of the water power filed their claim for damages, and, in 1870, while it was pending, the canal board passed a resolution defining the quantity of water intended to be taken by the former resolution, by which it was fixed at a certain number of cubic feet per minute, not the whole stream. In 1871, an award was made to the owners, which was paid. In 1879, the state appropriated all the water in the race-way. Upon a claim of damages for this appropriation, *held*, that the resolution of 1867 was too indefinite to effect a legal appropriation, and was void; that the state officers, therefore, had power by subsequent action to make an appropriation of a limited quantity of water; and that the payment for this limited appropriation did not defeat the claim for the residue when it was taken. *Id.*
3. In 1869, before trial of the first claim, the canal appraisers made a report to the legislature to the effect that the appropriation was of the entire water power. *Held*, that as the claimant was not a party to it, the report was not binding upon him. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

CANALS.

1. To make a legal and permanent appropriation by the State, of land or water for the use of a canal, the quantity must be definitely ascertained and described so that the owner may know how much has been taken and what he is entitled to be compensated for. *Hayden v. State of N. Y.* 533
- Van Wyck v. Allen* (69 N. Y. 62), distinguished. *Allan v. State Steamship Co.* 93
- Thomas v. Winchester* (6 N. Y. 397), distinguished. *Allan v. State Steamship Co.* 93
- Berrind v. G. Ins. Co.* (114 N. Y. 231), distinguished. *Petrie v. Phenix Ins. Co.* 144
- Angell v. Van Schaick* (56 Hun. 247), reversed. *Angell v. Van Schaick* 187

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Thurber v. Blanck (50 N. Y. 80), distinguished. *Macaulay v. Smith.* 532

Denise v. Denise (110 N. Y. 562), distinguished. *Sallade v. Gerlach.* 549

LaCroy v. N. Y., L. E. & W. R. R. Co. (57 Hun, 67), reversed. *LaCroy v. N. Y., L. E. & W. R. R. Co.* 570

CAUSE OF ACTION.

1. The originator or proprietor of an idea, trade, secret or system, which cannot be sold, negotiated or used without disclosure, must himself protect it from disclosure by some contract, and if he discloses it to another without contract, or any agreement as to compensation, the other is entitled to use it, and, if he does so use it to his benefit, he incurs no liability to the one who made the disclosure. *Bristol v. Eq. L. As. Soc.* 264

2. Plaintiff's complaint alleged in substance that, to induce defend.

ant to employ him, he communicated to it, in confidence, a new system of soliciting insurance business; that defendant, without plaintiff's knowledge, commenced the use of the system, and continued its use against his protests after discovery, and thereby obtained a large amount of business. Plaintiff asked for an accounting and payment of a reasonable compensation. On demurrer to the complaint, *held*, that it did not set forth a cause of action. *Id.*

See CONVERSION.

FRAUD.

MONEY HAD AND RECEIVED.

NEGLIGENCE.

SPECIFIC PERFORMANCE.

CARRIERS.

See RAILROAD CORPORATIONS.
STEAMSHIP COMPANIES.

CEMETERIES.

A cemetery was formerly owned by eleven persons as tenants in common; eight of them executed a power of attorney to G. and M. to sell and convey lots therein. M. did not act. G. undertook the execution of the power and continued to sell lots until he became disabled. Thereafter B. acted as attorney. In an action of ejectment to recover a lot in the cemetery, plaintiff claimed title under a sale in an action for partition between the original owners or their successors in title. Defendant claimed the lot by virtue of a purchase from G., and payment of part of the purchase-price to B., with agreement to pay the balance when the deed was delivered. It appeared that B. acted as attorney for a number of years, collecting money and paying the liabilities of the owner, and kept a book in which sales of lots were entered, in which was entered the sale of the lot to defendant. Defendant, immediately after his purchase, took possession of the lot, improved, graded and sodded it, buried seven persons therein and had been in possession for over twenty years. No deed was ever

tendered to him. *Held*, that a verdict was properly directed for defendant; that while no express authority for B. to act as attorney was shown, the fact that he did so with the knowledge and consent of the owners necessarily raised the inference of authority, and defendant, therefore, was rightfully in possession, and if the contract for the purchase was to be considered as executory, he was entitled to possession until the production and delivery to him of a deed; if not executory, he having entered under claim of title, acquired title by adverse possession. *Conger v. Treadway.* 259

CHATTEL MORTGAGE.

1. A legal title to property not in existence, actually or potentially, cannot be transferred by way of mortgage. *Deeley v. Dwight.* 59
2. Such an instrument, however, may be construed by a court of equity as operating by way of present contract to give a lien, which, as between the parties, takes effect, where there are no intervening rights of third persons, when the property comes into existence, and into the ownership of the party executing the instrument. *Id.*
3. In an action for the conversion of certain machinery, it appeared that plaintiff manufactured the machinery under a contract with one G., who had contracted to manufacture and deliver the same to defendants, and had received the purchase-price. Before any considerable portion of the machinery was manufactured, G. executed an instrument, in form a chattel mortgage, to one of the plaintiffs upon the machinery then completed and that thereafter to be made, as security for the price agreed to be paid. As the different pieces were delivered to G. he delivered them to defendants, who, before the filing of the mortgage and before they had notice of its existence or of plaintiffs' claim, expended a large sum in setting up the machinery, and in improvements to be used in con-

nection with it. *Held*, the action was not maintainable. *Id.*

CIVIL DAMAGE ACT.

- 1 In an action, under the Civil Damage Act (Chap. 646, Laws of 1873), to recover damages for personal injuries alleged to have been received through intoxication caused by liquors sold by the defendant, the plaintiff must show that the furnishing of the liquor was, in whole or in part, the proximate cause of the intoxication and that the liquor was furnished to the individual whose intoxication inflicted or caused the injuries complained of. *Dudley v. Parker.* 386

2. In such an action it appeared that plaintiff's injuries were caused by the act of S. who, when intoxicated, drove a horse and buggy against a carriage in which plaintiff was riding, upsetting it. S. had invited one G. to ride with him that day, provided another person did not do so. On the evening before the accident, when passing defendants' liquor store together, G. invited S. to go in with him, which he did; S. remained near the door, while G. went on to the counter, had a bottle filled with whiskey, which he paid for, and both left together. It did not appear that they drank any of the whiskey that night, or that S. was informed by G. of his purpose to procure it. The next day G. went with S., taking the bottle of whiskey, from which they both drank. G. subsequently left the buggy and S. took in another person, with whom he was driving when the accident happened. *Held*, that the evidence failed to show that the sale of the liquor by the defendants was the proximate cause of the intoxication of S., but that the supply to him by G. of the liquor purchased by the latter was the proximate cause; and so, that defendants were not liable, and a denial of a motion for a nonsuit was error. *Id.*

CODE CIVIL PROCEDURE.

- § 445. *Haebler v. Myers.* 363
 § 501. *Rothschild v. Whitman.* 472

549.	<i>Moffatt v. Fulton.</i>	507
606.	<i>Aldinger v. Pugh.</i>	403
828.	<i>Sallade v. Gerlach.</i>	548
829.	<i>Luetchford v. Lord.</i>	463
831.	<i>Warner v. Press Publishing Co.</i>	181
1022.	<i>Gilman v. Prentice.</i>	488
1005.		
1216.	<i>Haebler v. Myers.</i>	363
1292.		
1823.		
1638.	<i>Diefendorf v. Diefendorf.</i>	100
1639.		
2142.	<i>Haebler v. Myers.</i>	363
2263.		
2419.	<i>In re Trustees Importers & Grocers' Exchange.</i>	212
2492.		
3058.	<i>Haebler v. Myers.</i>	363

COMMISSIONER OF HIGHWAYS.

See HIGHWAYS.

COMMON CARRIER.

See RAILROAD CORPORATION.
 STEAMSHIP COMPANIES.

CONFLICT OF LAWS.

In an action by a real estate broker, living and doing business in Pennsylvania, to recover the compensation agreed upon for his services in effecting a sale for defendant, of certain lands in that state, the answer alleged in substance that under the statute laws of that state all persons are forbidden from engaging in that business, without paying the prescribed fee and receiving a commission, and also are prohibited from recovering any compensation or commission for such services. *Held*, that the validity of the contract was to be determined by the laws of Pennsylvania. *Angell v. Van Schaick.* 187

CONSIDERATION.

— When a promise to pay a broker his commissions for procuring a lease, where it appears he was not employed and rendered no services, is void for want of consideration. *See Myers v. Dean.* 64

CONSTRUCTION.

1. The law favors a construction of a will which will prevent partial intestacy. *Schult v. Mott*. 122
2. Where a policy of life insurance contains a promise to pay a certain specified sum, and this is followed by obscure clauses, difficult to be understood or requiring expert knowledge for their comprehension, they will not be construed as intended to impair the promise, but should receive the construction the insurer had reason to suppose was put upon them by the insured. To effect an impairment of the original obligation, the language of the subsequent clauses must be clear and unambiguous. *Wadsworth v. J. & T. Co.* 540

CONTEMPT.

Held, that a special surrogate, elected for the county of Oneida, had power to grant an injunction in a case where the county judge would have had jurisdiction (Code Civ. Pro. 606), and that one violating an order so granted was properly adjudged in contempt. *Aldinger v. Pugh*. 408

CONTRACT.

1. By a building contract, the contractor agreed "to put in a sewer" to connect the houses to be erected with another sewer, and to make water connections. At the time of filing a mechanics' lien there was nothing due under the contract, and all the payments called for by it had been made, except a sum due when the contract was completed. The contractor substantially performed the contract in other respects, but omitted to put in the sewer or make the water connections, and the owner, after notice to the contractor, completed the work in these respects at an expense of \$180. The whole contract price was \$2,850. The owner had paid \$2,020. There was no provision in the contract that the owner should complete the work in case the contractor failed to do so, or any understanding that the

former should proceed with the work, or any failure on his part to perform his obligations under the contract. In an action to foreclose the lien the court adjudged plaintiff to be entitled to a lien for the difference between the balance unpaid on the contract and the sum expended by the owner to complete it. *Held*, error; that plaintiff's right to recover depended upon the performance of the contract by the contractor; and that there was not a substantial performance by him. *Hollister v. Mott*. 18

2. While at law the stipulated time of performance of a contract for the sale of land is of the essence of the contract it is not essentially so in equity, and when the situation of the parties and the property remains unchanged relief may be granted. *Schmidt v. Reed*. 108
3. Reasonable diligence, in performance however, is requisite to such relief where there is no acquiescence in the delay. *Id.*
4. When, by the terms of such a contract the time for the performance is not of the essence thereof, it may be made so by reasonable notice by either party, to the other, and the party giving the notice may then avail himself of the forfeiture on default. *Id.*
5. Where in an action to recover the purchase-price as agreed to be paid under a contract for the sale of property, defendant sets up as a counter-claim a cause of action for fraud on the part of the vendor in the sale, as defendant does not proceed in disaffirmance of the contract, it remains effectual, subject only to such damages as defendant may have sustained from the fraud alleged; in such case, therefore, restoration by the defendant of anything received under the contract is not essential. *McIntyre v. Buell*. 192
6. In an action to recover the alleged purchase-price of certain goods, plaintiff's evidence was to the effect that his stock of goods, which was insured in four companies, having been damaged by fire, appraisers

were appointed, one by plaintiff, and one, the defendant, by the companies; that in order to facilitate the adjustment, defendant agreed to and did purchase, for himself, a portion of the damaged goods, in respect to which the appraisers could not agree, at cost price, he agreeing to pay the purchase-price to the companies in proportion to the amount of their respective policies, the amount to be included in the award as if the goods sold were a total loss. In respect to one of the companies, the financial condition of which was doubtful, defendant agreed that if it became insolvent within sixty days, so as not to pay its policy, he would pay its proportion to plaintiff. *Held*, that the agreement was not one to answer for the debt or default of another, but an agreement to pay the purchase-price of goods sold to himself, either to the company or to plaintiff; the contingency not affecting defendant's liability, which was absolute, but only the method of discharging it; and so that the contract was not within the Statute of Frauds; also, that the contract was not void as against public policy. *Goodman v. Cohen.* 205

7. By a contract for regulating and grading one of defendant's streets at a price specified for the different kinds of work, after providing for substantial performance in accordance with the specifications, it was stipulated that defendant's commissioner of public works should determine what would constitute a performance; daily inspection, a right on defendant's part to change the grade, and an examination by a surveyor after excavation, were also provided for, and when the completion of the work was duly certified by three of defendant's officers named, and also by its commissioner of public works, it agreed to pay therefor. In an action to recover for the work done at the contract prices, plaintiff produced in evidence the certificates required by the contract which showed the amount of work done, and certified to the completion of the contract and acceptance of the work. No fraud

or invalidity in the contract was alleged by defendant, and that the work as certified was done was not questioned, but it claimed on the trial non-compliance with this provision of the contract: "The street is to be regulated two feet below the grade where there is rock and is to be examined by the surveyor before placing any filling thereon. * * * Any portion of the street not thus regulated and properly examined will not be received as finished." This defense was not set up in the answer. Defendant was permitted to give evidence, under objection that it was not admissible under the pleadings, which tended to show that in places rock was left nearer than two feet to the established grade. The specifications provided that the street was "to be regulated and graded, where required, in accordance with the plans and profile of the said street," and other portions of the contract showed that the specifications were not necessarily to be exactly but substantially performed to the satisfaction of the commissioner of public works. It appeared that the surveyor gave to the contractor the grade to which the work was conformed, and he certified to the completion of the work as stipulated. *Held*, that defendant was precluded by the certificates given as required by the contract; and that conceding the evidence so given by defendant was properly received and could be considered, it did not affect plaintiff's right of recovery. *Brady v. Mayor, etc.* 415

8. The contract provided that the city should not be "precluded or estopped by any return or certificate" of any of its officers, made in pursuance of the contract, "from at any time showing the true and correct amount and character of the work." *Held*, that this provision did not have the effect to nullify defendant's agreement to be bound by the certificates of its officers as to performance, and did not affect the contractor's right to recover for the work done at the prices fixed, but that it simply reserved the right to challenge and to call upon the court to correct the certificates for error in these

particulars: 1. As to the amount of the work, *i. e.*, the number of yards of filling and excavation, etc. 2. As to the character of the work, *i. e.*, that one kind of work had been estimated for another.

Id.

9. Where, under a building contract, by which the contract price is to be paid by installments, a demand is made by the contractor for the installment due, and payment is refused, the contractor may lawfully refuse to go on with the contract. *Thomas v. Stewart.* 580

10. Where, by a building contract, payments are only to be made upon certificates of an architect, the refusal of the architect to give to the contractors a certificate, as required, if based upon an unreasonable requirement, will furnish no protection to the owner. *Id.*

— *A promise to pay a broker his commissions for procuring a lease, when it appeared he was not employed and rendered no services, is void for want of consideration.*

See Myers v. Dean.

65

— *Contract for services construed, and as to what amounts to and the nature and effect of a termination thereof.*

See Miller v. U. S. & S. Co. (Mem.)

562

— *As to what amounts to substantial performance of building contract.*

See Oberlies v. Bullinger (Mem.).

598

See ANTE-NUPTIAL AGREEMENT.

BROKER.

BUILDING CONTRACT.

INSURANCE (ACCIDENT)

INSURANCE (FIRE).

INSURANCE (LIFE).

INSURANCE (MARINE).

REFORMATION OF CONTRACT.

SPECIFIC PERFORMANCE.

CONVERSION.

1. In an action to recover damages for the alleged unlawful taking and conversion of certain goods it appeared that prior to the execution of an assignment for the

benefit of creditors, the defendant, as sheriff had, under two executions against the assignors, levied upon their goods, and a subsequent sale of part of them, after payment of the execution left a surplus. Subsequent to the assignment and while the goods unsold remained in defendant's possession, other executions came into his hands under which he claimed the right to sell a sufficient quantity of the goods remaining to satisfy said executions; the assignee without admitting the defendant's claim, in order to obtain possession of the goods, made an arrangement with the sheriff in pursuance of which he paid to the latter under protest a sum sufficient, with the surplus in his hands, to make up the amount of the other executions, and defendant thereupon released his levy. *Held*, that the proof failed to sustain the allegations of unlawful taking, and there was no unlawful conversion of the surplus; that the arrangement operated to discharge any cause of action for conversion and to substitute in its stead one for money had and received. *Freeman v. Grant.* 22

2. An action to recover damages for the conversion of chattels will not lie to enforce an equitable lien, as against the owner of the legal title, in possession of the property, who has not contracted it to the lienor. *Deeley v. Dwight.* 59

3. In an action for the conversion of certain machinery, it appeared that plaintiff manufactured the machinery under a contract with one G., who had contracted to manufacture and deliver the same to defendants, and had received the purchase-price. Before any considerable portion of the machinery was manufactured, G. executed an instrument, in form a chattel mortgage, to one of the plaintiffs upon the machinery then completed and that thereafter to be made, as security for the price agreed to be paid. As the different pieces were delivered to G. he delivered them to defendants, who, before the filing of the mortgage and before they had notice of its existence or of plaintiffs' claim, expended a large sum in setting up the ma-

chinery and in improvements to be used in connection with it. *Held*, the action was not maintainable. *Id.*

CORPORATIONS.

1. A corporation organized under the act of 1877 (Chap. 228, Laws of 1877), providing for the organization of exchanges or boards of trade, may be dissolved by the court upon petition and consent of a large majority of its trustees and members, when it appears that it is doing no business, because of the diverse interests of its members, although the corporation is solvent and a minority of the trustees and members oppose the dissolution. (Code Civ. Pro. §§ 2419-2432.) *Hitch v. Hawley.* 212

2. When it appears that the interests of the stockholders of such a corporation are so discordant as to prevent efficient management, and that a large majority of its trustees and members wish to wind up its affairs by a dissolution, the fact is established that the dissolution will be for the interests of the stockholders. *Id.*

See BOARD OF TRADE.

BUSINESS CORPORATIONS.

INSURANCE (ACCIDENT).

INSURANCE (FIRE).

INSURANCE (LIFE).

INSURANCE (MARINE).

MUNICIPAL CORPORATIONS.

RAILROAD CORPORATIONS.

STEAMSHIP COMPANIES.

COUNTER-CLAIM.

1. In an action, commenced in 1887, to recover an alleged balance unpaid of the purchase-price of a farm sold and conveyed in 1880, by plaintiff, to defendant, defendant set up as a counter-claim, and the referee found in substance that the sale was by the acre, that plaintiff represented that there were 230 acres in the farm, and relying thereon he agreed to pay for that number, that shortly before the commencement of the action he discovered that there were only about 211 acres. The referee found

that the agreement was the result of a mutual mistake. Defendant demanded a reformation of the contract and an allowance for the deficiency. *Held*, that defendant was entitled to the relief sought. *Gallup v. Bernd.* 370

2. Plaintiff in reply to the counter-claim pleaded the Statute of Limitations. *Held*, untenable; that the contract having been executed, defendant had no relief except in equity, and that the ten years limitation applied. *Id.*
3. Also *held*, that the correction of the mistake sought for could be made as well upon answer, as in a suit brought directly for that purpose. *Id.*

See PLEADING.

COURTS.

See COURT OF APPEALS.

COURT OF APPEALS.

While in some cases the Court of Appeals may assume the existence of a fact in order to affirm a judgment, this cannot be done when the evidence in regard to it is conflicting and the trial court has not been requested to determine the fact either way. *Hollister v. Mott.* 18

See APPEAL.

COVENANTS.

1. Where the owner of lands in a city has laid it out into lots, which are sold to different purchasers, each conveyance containing covenants on the part of the grantee running with the land restricting the use thereof to the purposes of a private residence, or prohibiting the erection thereon of certain specified structures, while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it in-

equitable to deprive a grantee or his successors in title of the privilege of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed. *American v. Deane*. 355

2. One B. owned a block of land in the city of New York, which he divided into lots for private residences and conveyed to different parties by deeds, each of which contained a covenant on the part of the grantee, his heirs and assigns, not at any time thereafter to erect, suffer or permit upon the premises conveyed any tenement-house, which covenant it was agreed should run with the land. In an action against one, who through various mesne conveyances, all of which contained said restriction, had become the owner of a lot in said block, brought by the owner of another lot, used as a private residence, to restrain a violation of the covenant, it was proved that the entire surrounding neighborhood had been mostly built up with flats or tenement-houses; that the tenement-house defendant was building was a large one, and he had expended large sums thereon. The trial court refused a permanent injunction, but fixed the permanent damages, *i. e.*, the difference in value of plaintiff's premises with and without defendant's tenement building, and awarded an injunction restraining the defendant from renting her building to any tenant until such damages and the costs were paid. *Held*, no error; that the court in awarding damages was not confined to those sustained before the commencement of the action. *Id.*
3. But *held*, that the trial court might properly and should have required plaintiff, upon receipt of the damages awarded, to execute to defendant a release of the covenant. *Id.*
- his pecuniary loss, *i. e.*, the value of the services of the child while incapacitated because of the injury and the reasonable expenses necessarily incurred in the effort to restore the child to health. *Barnes v. Keene*. 18
2. The amount of the loss recoverable is not affected by the financial condition of the parent. *Id.*
3. In such an action it appeared that the father, who had had experience as a nurse himself, in that capacity took the entire charge of the child; after proving the value of his services as such, he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse. *Held*, error: that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto what he might have made had he not abandoned the business engagement. *Id.*
4. The lunacy of a lessor does not discharge or affect his covenants in a lease executed before he was adjudged a lunatic; his estate, in the hands of a committee, will be liable for whatever damages his lessees have sustained because of a breach of a covenant for quiet enjoyment, and to the extent of such damages they are general creditors, and entitled to have their claim ascertained and paid in due course of administration. *In re Strasburger*. 128
5. The committee, however, owes no duty to the lessee of specific performance of the lunatic's covenants, and when the estate is chargeable with damages consequent upon their breach, it is entitled to the protection which the law extends to innocence in measuring such damages. *Id.*
6. In the absence of fault upon the part of a lessor, the lessee can re-

DAMAGES.

1. In an action by a father to recover damages for injuries to an infant child, caused by defendant's negligence, he is entitled to recover

6. In the absence of fault upon the part of a lessor, the lessee can re-

cover for a breach of a covenant of quiet enjoyment only such rent as he has advanced, and such *mesne* profits as he is liable to pay over.

Id.

7. S., who was the lessee of a building in the city of New York, sublet portions thereof to S. & A. D., which they in turn sublet to solvent tenants at largely advanced rentals. S. was thereafter adjudged a lunatic, and a committee appointed of his estate, which was insolvent. The D.'s made a payment of a quarter's rent in advance to the committee. The rent under the lease to S. not having been paid, he instituted summary proceedings to recover possession, and all the sub-tenants were dispossessed. Thereafter the committee, under order of the court, refunded to the D.'s the proportion of the rent so paid in advance for the portion of the quarter unexpired at the time of the dispossession. Upon a claim presented by the D.'s against the estate for damages, *held*, that they were entitled only to nominal damages.

Id.

3. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the court charged, on the question of damages, that plaintiff was entitled to recover for present pain and what he would endure in the future. *Held*, no error. *Kane v. N. Y., N. H. & H. R. R. Co.* 160

An imputation of malice arises from proof in an action of libel that the libelous publication is false, and when testimony is given on the part of defendant tending to prove the absence of actual malice, the question as to whether malice existed is one of fact, and found to exist, the jury in their discretion may award exemplary damages. *Warner v. Press Pub. Co.* 181

A libel recklessly or carelessly published, as well as one induced by personal ill will, will support an award of exemplary damages.

Id.

In actions to recover damages for injuries to real estate caused

by the unlawful separation and removal of something therefrom, the courts recognize two elements of damage. 1. The value of the thing taken, after separation from the freehold, if it have any. 2. The damage to the realty, if any, occasioned by the removal. *Dwight v. E. C. & N. R. R. Co.* 119

12. Where plaintiff asserts his right to go beyond the value of the thing taken or destroyed, after severance from the freehold, so as to secure compensation for the damage done to his land, the measure of damages is the difference in value of the land before and after the injury.

Id.

13. In an action to recover damages for alleged negligence, resulting in setting on fire and destroying certain bearing fruit trees upon plaintiff's premises, plaintiff's witnesses were asked what the trees were worth at the time they were killed, and were permitted to answer under objection and exception. *Held*, error; that the evidence tended to show, not the value of the trees severed from the soil, but their value as bearing fruit trees connected with and dependent upon the soil; that this was not a proper measure of damages.

Id.

14. The distinction pointed out between this case and where forest trees fully grown or nursery trees are unlawfully severed from the soil and carried away, or where coal or minerals are removed therefrom.

Id.

15. Where there is a diversion of the waters of the stream, which materially diminishes its natural flow over the lands of a proprietor below, he may maintain an action and is entitled to recover nominal damages, although he has as yet made no use of the waters, or water enough is left in the stream for the purposes of his business as then conducted. *N. Y. Rubber Co. v. Rothery.* 293

16. This right to recover nominal damages is substantial, as it confirms the proprietor's right to the beneficial use of the waters of the

stream as it was accustomed to flow before the diversion, and if withheld might tend to impeach or destroy his title by adverse user.

Id.

17. In an action to recover damages for such a diversion the court, after charging that if defendants diverted the waters of the stream, to a degree that materially and appreciably diminished its flow along the lands of plaintiff, the latter was entitled to nominal damages, charged in substance that the question must be determined by the use of the land as it was, and not with reference to the future; that the question was as to whether the water was diverted so as to leave the stream, to a material and appreciable extent, insufficient for the purposes of plaintiff's business, and refused to charge that plaintiff's right to maintain the action and to recover nominal damages did not depend at all upon his showing actual or perceptible damage. *Held*, error. *Id.*

18. One B. owned a block of land in the city of New York, which he divided into lots for private residences and conveyed to different parties by deeds, each of which contained a covenant on the part of the grantee, his heirs and assigns not at any time thereafter to erect, suffer or permit upon the premises conveyed any tenement-house, which covenant it was agreed should run with the land. In an action against one, who through various *mense* conveyances, all of which contained said restriction, had become the owner of a lot in said block, brought by the owner of another lot, used as a private residence, to restrain a violation of the covenant, it was proved that the entire surrounding neighborhood had been mostly built up with flats or tenement-houses; that the tenement-house defendant was building was a large one, and he had expended large sums thereon. The trial court refused a permanent injunction, but fixed the permanent damages *i. e.*, the difference in value of plaintiff's premises with and without defendant's tenement building, and awarded an injunction restraining the defend-

ant from renting her building to any tenant until such damages and the costs were paid. *Held*, no error: that the court in awarding damages was not confined to those sustained before the commencement of the action. *Amerman v. Deane*. 355

19. But *held*, that the trial court might properly and should have required plaintiff, upon receipt of the damages awarded, to execute to defendant a release of the covenant. *Id.*

DEBTOR AND CREDITOR.

1. While it is the duty of a creditor to whom property has been delivered as security for a debt, to use ordinary care for its protection and preservation, in determining what constitutes such care, the nature and value of the property and the means of protection possessed by the bailee, the relation of the parties and other circumstances must be considered. *Willetts v. Hatch*. 41

2. Defendant indorsed and delivered to plaintiffs a warehouse receipt for certain wet salted calf skins as security for a call loan. In an action to recover on the loan defendant sought to counter-claim damages resulting from a deterioration of the calf skins while in the warehouse, alleged to have been caused by plaintiffs' neglect to care for them. It appeared that plaintiffs gave no personal attention to the skins while in the warehouse and exercised no supervision over them; that defendant had free access to them and frequently went to the warehouse and examined them. The skins were all piled together and the injury was caused by the heating of those in the center of the pile; this did not appear upon the surface of the pile. When defendant discovered that the skins were injured he called plaintiffs' attention to it and advised that they be resalted or tanned; plaintiffs declined to do either; defendant also proposed to take them to his own warehouse and treat them. Plaintiffs did not consent, but suggested that defendant pay the debt and take the

skins. *Held*, that while the legal title to the property was vested in plaintiffs and the warehousemen were their bailees, defendant had at least an equal interest in the preservation of the property, the bailment being for the mutual benefit of the parties, and no duty devolved upon the former to cause it to be handled over and inspected; that plaintiffs were not required to permit defendant to take it to his own warehouse, and whether, under the circumstances, it was their duty to take some action for its preservation after being advised of its deterioration, for neglect to perform which they were liable, was properly submitted to the jury. *Id.*

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).

DECEIT.

See FRAUD.

DEED.

1. Assuming that a deed executed by an insane person is not voidable merely, but absolutely void, to establish its invalidity, it must appear that the grantor was, at the time he executed it, wholly, absolutely and completely unable to understand or comprehend the nature of the transaction. *Aldrich v. Bailey*. 85

2. In an action under the Code of Civil Procedure (§§ 1638, 1639) to determine conflicting claims to real property, plaintiff claimed title under a deed from D., her deceased husband; defendants claimed as his heirs at law. Plaintiff's evidence was to the effect that D., a few days before his death, sent for one A., asked him to draw a deed of his property to his wife, giving to him an old deed of the premises in question, and stating that he wished to give to her all of his property, real and personal, in consideration of \$3,000 she had paid to him, and other considerations. A. drew the deed, which was executed and acknowledged by D., a notary being in attend-

ance at his request to take the acknowledgment. D. then delivered it to A., with instructions to retain it for his wife until after his death, and then have it recorded. *Held*, that the transaction was not an attempted testamentary disposition of property, but a gift by deed; that to perfect the gift it was not essential that the delivery should have been to plaintiff, but the delivery to A. for her use was sufficient, and upon such delivery the title passed to plaintiff. *Diefendorf v. Diefendorf*. 100

3. Courses and distances mentioned in a conveyance must yield to the lines as actually and duly made by survey and described by marks and monuments, and while a line is given as running between two points will be presumed to be a straight one, where a reference is made to a survey which shows the line not to be a straight one, it will control. *Seneca Nation Indians v. Bugaboom*. 492

4. In an action of ejectment brought by plaintiff pursuant to the act of 1845 (Chap. 150, Laws of 1845), plaintiff claimed title under the treaty of 1802, between it and the Holland Land Company, and a deed executed in pursuance thereof by which a portion of the south line of the lands reserved and released to said plaintiff is described as running west from a post a certain number of chains. The description closes with a statement that the lands described were to be held by plaintiff "in the same manner and by the same tenor as the lands reserved" by plaintiff by a treaty or convention entered into September 15, 1797. The description also referred to a meridian line at the east line of the tract and to artificial monuments placed at the corners. Under the treaty of 1797 a survey of the lands was made and the line plainly marked; the meridian line referred to in the treaty of 1802 was located by and the monuments placed under that survey. If the south line was to be taken as a straight one between the two points given, the land in question would be included in the reservation, but it was not included by

the south line as shown by the survey. It also appeared that the south line as defined by the marks and monuments had been treated and designated as the southern boundary from the earliest time within the memory of witnesses; that a fence had been erected upon it in 1829, which has since remained, and the lands south of it have been occupied by defendant and his predecessors in title. *Held*, that the evidence authorized the conclusion that the line as surveyed was the southern boundary of the reservation, and so sustained a verdict for defendant. *Id.*

5. L. conveyed certain premises to S., T. and H. by deeds absolute on their face in pursuance of an agreement, by which she contracted to so convey as security for a loan for which the grantees agreed to and did make; said loan to be for a period not exceeding one year from the date of the deed. Upon repayment of the loan with the interest the grantees agreed to reconvey; but in case it was not repaid within the year, the grantor agreed that the deed should become absolute and that the grantees, their heirs and assigns, should become the owners in fee simple absolute. The loan was not repaid within the year, and thereafter the grantor surrendered possession of the premises to the grantees. Plaintiff levied upon the premises, by virtue of an attachment against L. as a non-resident, in an action wherein the summons was served by publication, obtained judgment by default, and issued execution thereon. In an action to have said deeds declared to be mortgages, and the premises subjected to the lien of the plaintiff's judgment, *held*, that plaintiff was entitled to the relief sought; that the deeds were mortgages; that the provision in the contract that if the loan was not repaid in the time specified they should become absolute conveyances, was ineffectual. *Macaulay v. Smith.* 524

— *When recitals in deed, although not evidence of facts recited as against strangers, are competent to show that entry was under claim of title.*

See McRoberts v. Bergman. 73

— *When deed furnishes presumptive evidence of possession by grantee.*
See McRoberts v. Bergman. 73

DEFENSES.

It is no defense to an action by a broker employed to effect an exchange of real estate to recover his commissions, that the title of the other party to the contract to the real estate agreed to be exchanged by him is defective, and so, that he is unable to perform his contract. *Kulley v. Baker.* 1

DEFINITIONS.

1. *It seems*, the word "relations," when used in a will relating to personality, only embraces persons within the Statute of Distribution. *Gallagher v. Crooks.* 338
2. As to whether the word when used in a devise is limited to persons within the Statute of Distribution, or to those within the Statute of Descent, *quære.* *Id.*

DETERMINATION OF CONFLICTING CLAIMS TO REAL PROPERTY.

1. In an action under the Code of Civil Procedure (§§ 1688, 1639) to determine conflicting claims to real property, plaintiff claimed title under a deed from D., her deceased husband; defendants claimed as his heirs at law. Plaintiff's evidence was to the effect that D., a few days before his death, sent for one A., asked him to draw a deed of his property to his wife, giving to him an old deed of the premises in question, and stating that he wished to give to her all of his property, real and personal, in consideration of \$3,000 she had paid to him, and other considerations. A. drew the deed, which was executed and acknowledged by D., a notary being in attendance at his request to take the acknowledgment. D. then delivered it to A., with instructions to retain it for his wife until after his death, and then have it recorded. *Held*, that the transaction was not an attempted testa-

mentary disposition of the property, but a gift by deed; that to perfect the gift it was not essential that the delivery should have been to plaintiff, but the delivery to A. for her use was sufficient, and upon such delivery the title passed to plaintiff. *Diefendorf v. Diefendorf*. 100

2. The period between the date of the deed and the commencement of the action was less than three years; her husband had been in possession for many years. Defendants moved to dismiss the complaint on the ground that plaintiff had not been in possession for three years, as required by the Code (§ 1638). *Held*, that the motion was properly denied, as she and the one whose estate she had, had been in possession for the three years, which was all that was requisite; that it was not essential that the possession for that period should have been adverse to defendants' claim. *Id.*

3. The property was a village lot, mostly covered by a building, the first floor of which was used for stores. Plaintiff occupied two floors, and the rest of the building was rented to tenants, who paid the rent to her. *Held*, that this constituted such actual possession as authorized plaintiff to bring the action. *Id.*

DEVISE.

See WILLS.

EASEMENTS.

Where the owner of two parcels of land imposes a burden upon one for the benefit of the other, and then conveys the former by absolute and unqualified deed, no easement in favor of the land retained against the parcel conveyed will be implied, unless at the time of the conveyance the burden was apparent, and is strictly necessary for the enjoyment of the parcel retained. *Wells v. Garbutt*. 480

EJECTMENT.

1. While in an action of ejectment, plaintiff must recover upon the

strength of his own title, not upon the weakness of that of defendant, where the former shows a title, better in respect of his right of possession, he is entitled to recover. *McRoberts v. Bergman*. 73

2. In an action of ejectment to recover possession of a salt meadow, and the beach and shore in front thereof lying next the waters of a salt water bay, plaintiff produced in evidence a deed to J., given in 1756, which conveyed two parcels of land; following the description of the last parcel was the following: "And also a little lot of salt meadow * * * to said lot belonging or appertaining." J. died in 1780, and whatever interest he had became vested, under his will, in his son S. S. died in 1845, and whatever title he had vested under his will in his son J. S., who in 1847 executed a deed to W., purporting to convey a piece of land, commonly called "the little salt meadow," bounded by the "sand beach or shore," and also "all the right, title and interest" of the grantor, "which was owned and enjoyed by" S. in his life-time, "in and to the beach, shore and waters of the bay in front of the said described premises." The two parcels of land described in the deed to J. were occupied by S. until his death as part of his homestead farm, and his title thereto was not disputed. The salt meadow and beach in question lie near to this farm and were occupied by him in connection with it, his possession was as complete as the character of the land and the uses to which he devoted it rendered practicable, and his ownership was unchallenged. On the trial defendants admitted plaintiff's title to the salt meadow and amended their answer so as simply to deny title to the sand beach. *Held*, that the identity of the salt meadow in question with that described in the deed of 1756 was sufficiently established. *Id.*

3. It appeared that the beach and meadow together formed but a single lot, with no artificial boundary between them, bounded by the sea in front and by ditches on

each side, and that during living memory the sea had encroached on the land so that the sea is now where the beach once was, and the present beach was once part of the salt meadow. *Held*, that the presumption was that S. died seized of the *locus in quo*, deriving title under the deed to his father; that W. acquired a *prima facie* title under his deed from J. S., which afforded sufficient presumptive evidence of subsequent possession by the grantee, and those holding under him, in the absence of actual proof of a twenty years' adverse possession by a stranger to that title. *Id.*

4. The deed of 1756, by its recitals, purported to deduce title from colonial grants made in the previous century. *Held*, that while the recitals were not evidence of the facts recited against strangers to this title they were evidence that the grantors and grantee made a claim of title, and so characterized J.'s original entry. *Id.*

5. A cemetery was formerly owned by eleven persons as tenants in common; eight of them executed a power of attorney to G. and M. to sell and convey lots therein. M. did not act. G. undertook the execution of the power and continued to sell lots until he became disabled. Thereafter B. acted as attorney. In an action of ejectment to recover a lot in the cemetery, plaintiff claimed title under a sale in an action for partition between the original owners or their successors in title. Defendant claimed the lot by virtue of a purchase from G., and payment of part of the purchase-price to B., with agreement to pay the balance when the deed was delivered. It appeared that B. acted as attorney for a number of years, collecting money and paying the liabilities of the owner, and kept a book in which sales of lots were entered, in which was entered the sale of the lot to defendant. Defendant, immediately after his purchase, took possession of the lot, improved, graded and sodded it, buried seven persons therein, and had been in possession for over twenty years. No deed was ever

tendered to him. *Held*, that a verdict was properly directed for defendant; that while no express authority for B. to act as attorney was shown, the fact that he did so with the knowledge and consent of the owners necessarily raised the inference of authority, and defendant, therefore, was rightfully in possession, and if the contract for the purchase was to be considered as executory, he was entitled to possession until the production and delivery to him of a deed; if not executory, he having entered under claim of title, acquired title by adverse possession. *Conger v. Treadway.* 259

6. In an action of ejectment the following facts appeared: The premises in question belonged to one G., who died leaving a will, by which he devised and bequeathed his property to his widow for life, subject to an annuity to his brother J.; after her death he provided for the payment of certain bequests and directed that the remainder, if any, be equally divided between the children of J. G. and all the testator's relations by his father's side in the United States at the date of his will, subject to the payment of said annuity to J. The will then provided as follows: "He (J.) is to have nothing from my property, and I hereby cut off from inheriting any thing or property of mine his wife, or any person in any way related to her, either by blood or marriage, with the exception of himself, and he only in the way I have stated above." After the death of the testator's widow this action was brought by the widow, the children and grandchildren of J. Plaintiffs gave evidence tending to show that J. G. died unmarried and without children, and that the testator had no relatives living in the United States at the date of his will or death who were descended from his grandfather or father, other than plaintiffs. *Held*, that while the burden was upon plaintiffs of showing that there were no persons living who could take as remaindermen, it was sufficient to make out a *prima facie* case, and as their evidence showed the existence of any such person to be improbable, it

was sufficient for that purpose, and that, therefore, a nonsuit was error. *Gallagher v. Crooks*. 338

7. In an action of ejectment a judgment in partition which is a link in the chain of title of one of the litigants is evidence as against the other, although a stranger to it. *Greenleaf v. B., F. & C. I. R. R. Co.* 408

8. Where such a judgment or a deed is so ancient that no person living can testify to acts of ownership under it, it is admissible in evidence without proof of contemporaneous possession of the land by the parties to the judgment or deed. *Id.*

9. Such a judgment or deed, however, is not sufficient evidence to establish title in one who claims under it, through mesne conveyances, without showing some subsequent or modern possession by those who received later deeds which go to make up the claimant's chain of title. *Id.*

10. In an action of ejectment plaintiff claimed title under a judgment rendered in 1848 in a partition suit, by which certain meadow land bounded on the Atlantic ocean, including the land in question, which was land on the ocean beach, was set off to J., one of the parties, also a deed to him from the other parties to that action. There was no evidence that the land in question had been occupied by J. or his successors in title for any purpose, or that he was ever in possession of or exercised any acts of ownership over the land set off to him, except by assuming to convey it. *Held*, that the evidence failed to establish title in plaintiff. *Id.*

EMINENT DOMAIN.

To make a legal and permanent appropriation by the State, of land or water for the use of a canal, the quantity must be definitely ascertained and described so that the owner may know how much has been taken and what he is entitled to be compensated for. *Hayden v. State of N. Y.* 533

EQUITY.

1. While at law the stipulated time of performance of a contract for the sale of land is of the essence of the contract it is not essentially so in equity, and when the situation of the parties and the property remains unchanged relief may be granted. *Schmidt v. Reed*. 108

2. Reasonable diligence, in performance however, is requisite to such relief where there is no acquiescence in the delay. *Id.*

3. Where the owner of lands in a city has laid it out into lots, which are sold to different purchasers, each conveyance containing covenants on the part of the grantee running with the land restricting the use thereof to the purposes of a private residence, or prohibiting the erection thereon of certain specified structures, while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee or his successors in title of the privilege of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed. *Amerman v. Deane*. 355

ESCHEAT.

1. Under the provision of the act of 1874 (Chap. 261, Laws of 1874), amending the act of 1845 (Chap. 115, Laws of 1845), in reference to aliens taking and holding lands in this state, which provides that if an alien resident, or a naturalized or native citizen, "has died or shall hereafter die" holding a conveyance of lands in the state, purchased by such person, and "leaving persons who would answer the description of heirs," such persons, whether citizens or aliens, may take and hold the lands as heirs, etc., the state surrendered its title to lands acquired by escheat previous to the passage of

the act, of which it had not before that time assumed in any manner to make disposition, where the person, to whose title the state so succeeded, died leaving alien heirs.
Wainwright v. Low. 313

2. S. died in 1871, intestate, seized of certain real estate; she left the plaintiff, an alien, her only heir at law. By an act passed in 1876 (Chap. 184, Laws of 1876), the state released its right and interest in the lands to A., the husband of S., with the proviso, however, that nothing therein contained should "affect the right in said real estate of any heir at law." Before the passage of the act of 1874, no proceeding for escheat had been taken by the state. The trustee having died, upon petition of A. a new trustee was appointed by the court, with directions to convey the premises to A., which was done. In an action of ejectment, defendant claimed title under said conveyance to A. *Held*, that upon the passage of said act of 1874, the title vested in plaintiff, which title was not affected by the act of 1876; that, therefore, A. acquired and conveyed no title or interest by his deed; and that judgment was properly directed for plaintiff.

Id.

EVIDENCE.

1. O. & Co., who were insurance brokers and defendant's agents, issued to P., a forwarder in New York city, a "Uniform Canal Cargo Policy" of insurance, by which defendant agreed to insure the several persons whose names were indorsed thereon, or in a book provided for that purpose; no risk to be considered as insured unless the indorsement was approved and signed by the company or its authorized agents. A book was delivered with the policy, ruled in columns with printed headings, one being "Signature of Approval." In an action upon the policy, plaintiff's evidence was to the effect that by the course of business between P. and O. & Co., a cargo to be insured was entered by P. in this book, which was sent to O. & Co. for their approval. When the risk was taken for "the harbor of New York," the approval was denoted by the word "harbor" written in that column opposite the name of the assured and the boat or vessel insured. P., having loaded a canal boat, entered in said book the name of the boat, description of cargo, etc., and sent it to O. & Co., who wrote the word "harbor" in said column. *Held*, that, under the circumstances, the contract was not so indefinite and uncertain as to render it void. *Petrie v. Phenix Ins. Co.* 137
2. The cargo in question was shipped to Tarrytown. Evidence on behalf of plaintiff was offered and received to the effect that the term "harbor of New York," as used in the business of insurance, included Tarrytown and other points in the New York custom-house district. *Held*, that the evidence was competent. *Id.*
3. The publication, upon which an action for libel was based, suggested improper relations between plaintiff and one S. The husband of plaintiff was called as a witness by defendant, and asked if he had had any dispute or conversation with his wife in relation to S. This was objected to and excluded as incompetent under the provision of the Code of Criminal Procedure (§ 831), prohibiting a husband or wife from disclosing, without the consent of the other, a confidential communication made by one to the other. *Held*, no error. *Warner v. Press Publishing Co.* 181
4. In an action to recover damages for alleged negligence, resulting in setting on fire and destroying certain bearing fruit trees upon plaintiff's premises, plaintiff's witnesses were asked what the trees were worth at the time they were killed, and were permitted to answer under objection and exception. *Held*, error; that the evidence tended to show, not the value of the trees severed from the soil, but their value as bearing fruit trees connected with and dependent upon the soil; that this was not a proper measure of damages. *Dwight v. E. C. & N. R. R. Co.* 190
5. While statements of a person injured, expressive of his present

condition, made to a physician for the purpose of treatment, may be proved in his behalf, statements made as to the past, *i. e.*, as to pains which he had suffered or disabilities he had labored under, are not competent, and error in receiving such statements is not cured by testimony on his part that such statements were true. *Davidson v. Cornell.* 228

In an action of ejectment a judgment in partition which is a link in the chain of title of one of the litigants is evidence as against the other, although a stranger to it. *Greenleaf v. B., F. & C. I. R. Co.* 408

Where such a judgment or a deed is so ancient that no person living can testify to acts of ownership under it, it is admissible in evidence without proof of contemporaneous possession of the land by the parties to the judgment or deed. *Id.*

Such a judgment or deed, however, is not sufficient evidence to establish title in one who claims under it, through mesne conveyances, without showing some subsequent or modern possession by those who received later deeds which go to make up the claimant's chain of title. *Id.*

In an action to foreclose a mortgage executed by defendants, who were husband and wife, upon lands of the latter to secure their joint bond, the wife, who alone answered, alleged that part of the consideration of the bond and mortgage was a gambling debt due the mortgagee from the husband, and that, at time of the execution of the bond and mortgage, the persons who would have been entitled to the mortgaged premises were the defendant's four children. The mortgagee died prior to the bringing of the action. Upon the trial the wife called the husband as a witness to prove the averment as to the consideration of the bond and mortgage; this was objected to and the testimony excluded on the ground that the witness was incompetent under the Code of Civil Procedure (§ 829) to testify to conversations or transactions

between him and the deceased mortgagee. *Held*, no error; that the provisions of the Revised Statutes (1 R. S. 663, §§ 16, 17), upon which the defense was based, which declare all things in action and securities, any part of the consideration for which is money won by playing at any game, to be "utterly void," except where the security affects real estate, when it shall be void as to the grantee, but shall inure to the sole benefit of the person entitled to the real estate in case the grantor or incumbrancer had died immediately upon the execution of the instrument, could not be construed as operative to transfer to the mortgagor's heirs title to the mortgage alone, leaving the bond valid in the hands of the obligee; that the mortgage being merely an incident of the debt, the necessary effect of the statute is that the bond goes with it to the mortgagor's heirs, not absolutely, but only so far as necessary to give validity to the mortgage, and in case the amount of the debt exceeded the value of the land mortgaged, to the extent of the excess, the bond, if the defense was sustained, would be utterly "void," and as judgment was sought against the witness for any deficiency, he was directly interested in the event of the action. *Luetchford v. Lord.* 465

10. In an action by an abutting owner to restrain the operation of defendants' elevated railroad, in a street in front of plaintiff's premises, for the purpose of showing the permanent or fee damages, plaintiff was permitted to testify that certain offers had been made to him for the premises before the construction of the railroad. *Held*, error; that the testimony was simply the declarations or opinions of others as to value; also, that for such a purpose offers might not be proved even by the parties making them. *Hine v. Manhattan R. Co.* 477

11. Where in an action by an abutting owner against an elevated railroad company to restrain the operation of its road in a street, the question of fee damages is gone into for the purpose of determining the

sum to be paid by defendant for a conveyance of plaintiff's rights in the street of which he has been deprived, the opinions of witnesses as to what plaintiff's premises would have been worth if they were unaffected by the road and its operation, is incompetent. *Jefferson v. N. Y. E. R. R. Co.* 488

12. In an action upon a promissory note indorsed by defendant G., he answered to the effect that he held the legal title to certain letters patent owned by H., in order to affect a sale thereof for H.; that he sold an interest therein to the maker of the note, which was given in part payment; that at the request of H. the note was made payable to and was indorsed by G., in order simply to show that he had properly discharged the trust, and that the note was afterwards wrongfully diverted by H. The latter died before the trial. Upon the trial G., as a witness in his own behalf, was asked how it happened that the note was made payable to his order. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 828). *Held*, no error. *Sallade v. Gerlach.* 548

— *When recitals in deed, although not evidences of facts recited as against strangers, are competent to show that entry was under claim of title.*

See McRoberts v. Bergman. 73

— *When order describing a highway found among old records of a town proper evidence.*

See James v. Sammis. 289

— *A party's own letter not evidence in his own behalf of facts therein stated which are not part of the res gesta.*

See E. M.'s Son's Co. v. Smith (Mem.). 591

EXCEPTIONS.

— *When exceptions insufficient to present question on appeal.*

See Mitchell v. Met. E. R. R. Co. (Mem.). 552

EXECUTION.

In an action to recover damages for the alleged unlawful taking and

conversion of certain goods, it appeared that prior to the execution of an assignment for the benefit of creditors, the defendant, as sheriff, had, under two executions against the assignors, levied upon their goods, and a subsequent sale of part of them, after payment of the execution left a surplus. Subsequent to the assignment, and while the goods unsold remained in defendant's possession, other executions came into his hands under which he claimed the right to sell a sufficient quantity of the goods remaining to satisfy said executions; the assignee, without admitting the defendant's claim, in order to obtain possession of the goods, made an arrangement with the sheriff in pursuance of which he paid to the latter under protest a sum sufficient, with the surplus in his hands, to make up the amount of the other executions, and defendant thereupon released his levy. *Held*, that the proof failed to sustain the allegations of unlawful taking, and there was no unlawful conversion of the surplus; that the arrangement operated to discharge any cause of action for conversion and to substitute in its stead one for money had and received. *Freeman v. Grant.* 22

FINDINGS OF LAW AND FACT.

Where, upon the trial of an action before a referee, motions by defendant for a dismissal of the complaint were made before the taking of any evidence and after plaintiff rested, which were not passed upon by the referee, he reserving his decision, and thereafter evidence was introduced by defendant, and the case submitted to the referee without a renewal of the motions or calling for a decision thereon, and subsequently the referee made his report, dismissing the complaint without any findings of fact, or requests to make any such findings, *held*, that the judgment was not reviewable here, because of the absence of findings required by the Code of Civil Procedure (§ 1022). *Gilman v. Prentice.* 488

FORECLOSURE.

See MORTGAGE.

FOREIGN CORPORATIONS.

By the statute of Great Britain, known as the "Passengers' Act 1855" every passenger ship is required to carry a duly qualified medical practitioner and its owner or charterer is required to provide for the use of its passengers a supply of proper and necessary medicines for their medical treatment during the voyage, properly packed and placed under the charge of a medical practitioner "to be used at his discretion." In an action to recover damages against a corporation of Great Britain for injuries alleged to have been sustained by plaintiff, a passenger on one of its steamers, alleged to have resulted from taking calomel furnished by the steamer's physician in response to a request for "quinine," it appeared that defendant issued a prospectus to advertise its line, which contained a statement that an experienced surgeon was carried on board each ship and that all medicines were supplied gratis. *Held*, that defendant assumed no duty or liability beyond those imposed by the statute, *i. e.*, to employ a duly qualified physician, to provide a supply of suitable and necessary medicines, properly packed and labeled and to provide a proper place in which to keep them; and that, having complied with these requirements, for errors and mistakes on the part of the physician thereafter, it was not responsible. *Allan v. State S. S. Co.* 91

— *As to liability of a steamship company of Great Britain to passengers for negligence.*

See *Allan v. State Steamship Co.* 91

FOREIGN LAWS.

— *As to liability of a steamship company of Great Britain to passengers for negligence.*

See *Allan v. State Steamship Co.* 91

FORMER ADJUDICATION.

1. P. died leaving him surviving his widow, a daughter and five grandchildren, two of them children of the daughter, three the children of deceased sons; he died seized of four parcels of real estate. By his will he directed his executors, if his widow consented, to sell said real estate, invest one-third of the proceeds and pay the income therefrom to his widow during her life in lieu of dower, and after her death divide the principal among his grandchildren then surviving; one-third he gave to his daughter, the other third to his daughters-in-law and their children. The testator directed his executors to dispose of his residuary estate or put it in shape to divide equally among his said grandchildren "whenever either shall become of age." The will then contained this clause: "It may so happen that my daughter * * * may live to have other children after my death, and after my executors may have divided my estate; in that case, it is my wish that they come in and share in the estate left my wife after her death in preference to the others, so that all my grandchildren may eventually receive the same amount." The widow refused to accept the provision made for her. In pursuance of a judgment in a suit for the partition and sale of the four parcels, three of them were sold, one-third of the proceeds being brought into court and the proceeds invested, the income to be paid to the widow during life as and for her dower interest. Thereafter, and during the life of the widow and before a division of the residuary estate, a child was born of the testator's daughter. The original judgment in the partition suit provided that the principal of the one-third directed to be invested for the benefit of the testator's widow should at her death be divided among the survivors of the five grandchildren, "subject to open and let in and share in the same" any child the testator's daughter "shall have previously had lawfully born to her after the death of said testator, who shall then survive, and

provided also that if previously to the birth of said after-born child a division of the residuary estate of the said testator shall have been made, * * * then said after-born child shall be preferred out of the said principal sum * * * to the extent, so far as may be, of making them equal with said five grandchildren." It was claimed that by this provision, G., the after-born child could not share because born previous to the distribution of the residuary estate. *Held*, untenable; also, that, if necessary, the court would have power to amend the judgment. *Hotaling v. Marsh.* 29

2. In an action brought before the birth of G. to obtain a construction of the residuary clauses of the will, it was adjudged that the residuary estate vested at the time of the testator's death in his five grandchildren, subject to open and let in any child lawfully born of the testator's daughter previous to either of the five grandchildren coming of age, and as one of said grandchildren had arrived of age and no child had been born of the daughter, that no child so born thereafter "would be entitled to any share in the said residuary estate." *Held*, that assuming G. was bound by said judgment, it did not affect her right to share in the principal of the one-third set apart for the widow; that it only determined her right to share in the residuary estate, which she did not claim.

Id.

3. Upon an accounting by the executors, G., then an infant, appeared by guardian. The surrogate, in his final decree, distributed the residuary estate among the other grandchildren, excluding G. *Held*, assuming the decree to be binding upon her, it did not affect the question under consideration here.

Id.

FRAUD.

1. Defendant issued to plaintiff a policy of insurance upon a building; the legal title thereto was in plaintiff's son. Plaintiff was in possession under a verbal agreement, whereby he was to occupy the premises during his life, and

in consideration thereof to keep the building insured, in repair, and to pay the taxes. The policy provided that it would be void if, without notice to the company and permission therefor indorsed on the policy, the interest of the insured was other than absolute ownership. Plaintiff informed defendant's general agents, who issued the policy, that his son had bought the property for him; that he was to have it as a home as long as he lived, and was to insure it. The amount of the insurance was \$1,100. A loss having occurred, plaintiff, upon the representations of the defendant's adjuster that the policy was void by reason of the breach of the condition as to title, agreed to accept \$400 in settlement of his claim. He received a draft for that sum upon defendant, drawn by its general agent, payable to his order, and executed a paper canceling the policy, which he delivered to the agent; thereafter he offered to return the draft and demanded full payment of the loss, which was refused. In an action to set aside the compromise and cancellation, and to recover upon the policy, the court found that the settlement was procured by the statement so made by the adjuster, and that plaintiff was entitled to the relief sought. *Held*, no error; that there was not simply a mistake, but a surrender of legal rights intentionally induced by false representation as to the law; that this constituted fraud. *Berry v. Am. C. Ins. Co.* 49

2. The parties entered into a contract by which plaintiff agreed to sell and defendant to purchase a certain lot in the city of New York; the latter refused to perform the contract because of the filing of a *lis pendens* a few days before the making of the contract, in an action to have certain deeds and other instruments affecting the title to the block of which the lot formed a part, declared void. Neither the plaintiff here nor her grantor were made parties to that action. The complaint therein alleged that P., the former owner of the block, when he, by reason of extreme old age, was "mentally weak, incompetent and unsound of mind, in-

pable of attending to business personally, and incapable and incompetent to understand and comprehend properly the nature of a business transaction," and when entirely under the control of S., agent, through force and fraud practiced upon him by S., who was bribed thereto by the defendant, acting in pursuance of a fraudulent scheme and conspiracy entered into between them to obtain title to the property, caused and influenced P. to make a contract agreeing to convey the property in question to E., one of the defendants, in exchange for her real estate, and subsequently coerced P. to execute such a conveyance, which contract and conveyance was in fraud of the rights of plaintiff in that action as heir at law and legatee of P. *Held*, that the averments of the complaint were not sufficient to justify finding that P. was insane when he executed the contract and deed, and that the gravamen of the action was fraud; that, as it was conceded that plaintiff here took title to the lot in question in good faith, paying a full consideration, his title was not affected by the fraud (2 R. S. 137, § 5), and that plaintiff was entitled to a judgment for specific performance. *Idrich v. Bailey.* 85

To constitute a cause of action for fraudulent representations on the part of the vendor on sale of property, it is necessary to show not only a false statement or representation as to the property but that such representations were made with intent to deceive, and that the accomplishment of this intent was the result of the vendee's reliance upon the representations. *McIntyre v. Buell.* 192

Where in an action to recover the purchase-price as agreed to be paid under a contract for the sale of property, defendant sets up as a counter-claim a cause of action for fraud on the part of the vendor in the sale, as defendant does not proceed in disaffirmance of the contract, it remains effectual, subject only to such damages as defendant may have sustained from the fraud alleged; in such

case, therefore, restoration by the defendant of anything received under the contract is not essential. *Id.*

5. Plaintiff, who owned what was termed "a locator's mining claim" in government lands, contracted to convey the same to a company to be formed to develop the "lode," defendants, as part of the consideration, agreeing to pay a sum named. The claim was conveyed as agreed. In an action to recover a portion unpaid of the purchase-money, defendants set up as a counter-claim that plaintiff, to induce them to enter into the agreement, falsely and fraudulently represented that he was seized of the whole lode, when he had, in fact, previously conveyed his right to one-third of the surface ground of the lode to a niece, whereby they sustained damage. Plaintiff denied making any false representations, and testified that he informed defendants that he had given to his niece one-third of the surface. A deed to the niece was given in evidence. The court charged that it conveyed the right to the surface only, and did not impair plaintiff's right to the materials beneath. To this defendants excepted. The jury found for plaintiff on the issue of fraud. *Held*, that whether the deed conveyed one-third of the whole claim or a right only to one-third of the surface, if plaintiff represented that he owned the whole, the falsity of the representation was established; but that the jury having found with plaintiff on this issue, the construction of the deed was immaterial, so far as the counter-claim was concerned, and so, if erroneous, was not ground for reversal; that had the jury been instructed that the deed conveyed one-third of the mine instead of one-third of the surface only, this, conceding it to be correct, would not alone have warranted a finding of fraud, as while it would show a mistake on the part of plaintiff as to the construction, it would not establish any fraudulent intent. *Id.*

6. *It seems*, where a lessor of premises for a residence, knowing that

the time of the execution of the lease of the existence of secret defects or conditions rendering the building unfit for a residence, fraudulently represents to the lessee that they do not exist, or fraudulently conceals their existence, if the lessee abandons the house because thereof, he will not be liable for rent subsequently accruing. *Daly v. Wise.* 306

7. *It seems*, also, that in case a party for the purpose of inducing another to contract with him, states that a material fact does or does not exist, without having knowledge of the truth of the statement and without having reasonable grounds for believing it to be true, he is liable in fraud, if the statement is relied on and is subsequently found to be false, although he had no actual knowledge of its untruth. *Id.*

8. An intentional withholding and secreting by the assignor of assets of a substantial value from the possession of the assignee, is a fraud upon the rights of creditors of the assignor, and renders a general assignment for the benefit of creditors void. *Coursey v. Morton.* 556.

9. Every party must be deemed to have intended the natural and inevitable consequences of his own acts, and so, when they are voluntary and necessarily operate to defraud others, he will be deemed to have intended the fraud. *Id.*

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).

GIFT.

In an action under the Code of Civil Procedure (§§ 1638, 1639) to determine conflicting claims to real property, plaintiff claimed title under a deed from D., her deceased husband; defendants claimed as his heirs at law.

Plaintiff's evidence was to the effect that D., a few days before his death, sent for one A., asked him to draw a deed of his property to his wife, giving to him an old deed of the premises in question, and stating that he wished to give to her all of his property, real and personal, in consideration of \$3,000 she had paid to him, and other considerations. A. drew the deed, which was executed and acknowledged by D., a notary being in attendance at his request to take the acknowledgment. D. then delivered it to A., with instructions to retain it for his wife until after his death, and then have it recorded. *Held*, that the transaction was not an attempted testamentary disposition of property, but a gift by deed; that to perfect the gift it was not essential that the delivery should have been to plaintiff, but the delivery to A. for her use was sufficient, and upon such delivery the title passed to plaintiff. *Diefendorf v. Diefendorf.* 100

HEIRS.

1. To cut off the right of an heir to inherit there must be a legal devise; mere words of disinheritance are insufficient to effect that purpose. *Gallagher v. Crooks.* 338
2. Where, therefore, a testator fails to make a legal devise of his realty, or having legally devised it, the devise fails for any cause, the heir will inherit notwithstanding there is an express provision in the will that he shall not take any part of the estate. *Id.*

HIGHWAYS.

1. While the Hudson river is a highway for the passage of vessels, that portion of it which is embraced within the boundaries of a city is not one of its highways, so as to burden it with the duty of removing obstructions and keeping it safe for navigation. *Coonley v. City of Albany.* 145
2. Plaintiff, while riding upon a load of hay along one of defendant's

highways, was injured by being swept from the load by the limbs of a tree, which overhung the traveled track. On trial of an action to recover damages on the ground of alleged negligence of defendant's commissioners of highways, the court charged as follows: "Notice must be proven of the existence of the obstruction a sufficient length of time, from which a jury may say a commissioner ought to have known it. Now it is nothing of any consequence that thousands have passed there without injury. If this obstruction existed so long that a vigilant officer should have known of its existence, they are liable." In accordance with requests of defendant's counsel, the court then charged in substance that the jury had a right to take into consideration, in determining whether the commissioners were chargeable with notice, the fact that people driving on loads of hay had passed under this tree without difficulty; also the fact that no complaint had been made to the commissioners. Said counsel then excepted to the sentence in the charge that "it is nothing of any consequence that thousands passed there without injury." *Held*, untenable. *Embler v. Town of Wallkill*. 222

3. It appeared that, before the time of the accident, a city was incorporated which embraced territory belonging to the town, and that the commissioners of highways, for whose negligence the town was sought to be made liable, were elected before the incorporation by electors of the town, including those who resided within the present limits of the city. Defendant claimed that the city was jointly liable, and should have been made a party. *Held*, untenable. *Id.*

4. It appeared that defendant had occasionally traveled on this highway, but never before on a load of hay, and he testified that he never had had occasion to observe how low the branches of the apple tree hung, or how far they extended. Defendant's highway commissioners gave testimony to the effect

that they had never known any difficulty from said tree, and that any danger therefrom was not obvious to them. Defendant claimed that the danger was so apparent that plaintiff and the driver of the load were, as matter of law, chargeable with contributory negligence. *Held*, untenable. *Id.*

5. In an action for alleged trespass in entering upon plaintiff's land in the town of Huntington, and taking down his fence, the defense was that the *locus in quo* was part of a public highway which bounded plaintiff's premises on the south, upon which the fence encroached and that it was removed by order of the highway commissioners. It appeared that in 1869, the fence on the south side of the highway which had been located there for over forty years was moved south, which constituted the alleged encroachment claimed by the defendants. With a view to proceedings for removal of the fence under the provisions of the Revised Statutes (1 R. S. 501-526, §§ 100-108, as amended by chap. 245, Laws of 1873), which declares that all roads not recorded which have been used as public highways for twenty years, shall be considered such, and authorizes proceedings for removal of encroachments, the commissioners of highways of the town in 1885, made an order purporting to define and describe the highway, which with a map thereof, was made of record in the town. In 1886, the commissioners made an order describing the alleged encroachment, and directing the removal of the fence. This order with a notice annexed was served upon plaintiff, and after sixty days, under direction of the commissioners, the fence was removed by defendants. It was claimed by plaintiffs that said statutory provisions were not effectual to support the proceedings, because prior to 1864, they had no application to the town, it being governed by special acts (Chap. 14, Laws of 1789; chap. 56, Laws of 1830). These acts were repealed by the act of 1864 (Chap. 514, Laws of 1864), and by the act of 1865 (Chap. 6, Laws of 1865) the general statutes were extended

to the counties named in said special acts. *Held*, that as at the time of the encroachment and of said order, the road had been used as a public highway for twenty years, it was within and subject to said provisions of the Revised Statutes; that the amendment in 1878, in reference to the removal of encroachments, merely gave an additional remedy, which was available although it did not exist at the time of encroachment. *James v. Sammis.* 289

6. Also *held*, that prior to said statutes of 1864 and 1865, the provisions of the Revised Statutes, as they then were, were effectual in the counties named in the special acts, as they were not in conflict but were consistent with them, and for purposes for which no provision was made in the local statutes. *Id.*

7. Defendants introduced in evidence a paper found among the old records of the town, purporting to be an order made in 1746, by the town commissioners "in pursuance of an order of General Assembly," which described the highway in question. *Held*, that the order was properly received in evidence and that it was within the statutory power of the commissioners to make it. (Chap. 575, Col. Laws 1732; chap. 686, Col. Laws 1739.) *Id.*

8. It was claimed that the notice served by the commissioners upon plaintiff was defective in that it did not specify the breadth of the road originally intended as required by the statute (1 R. S. 526, § 103, as amended by chap. 245, Laws of 1878). *Held*, untenable; that the order contained it, and as this was annexed to and served with the notice, they practically constituted a single document and this was sufficient; that it was not essential that the specification should appear in both notice and order. *Id.*

9. In an action by an abutting owner to restrain the operation of defendant's elevated railroad, in a street in front of plaintiff's premises, for the purpose of showing the permanent or fee damages, plaintiff

was permitted to testify that certain offers had been made to him for the premises before the construction of the railroad. *Held*, error; that the testimony was simply the declarations or opinions of others as to value; also, that for such a purpose offers might not be proved, even by the parties making them. *Hins v. Manhattan R. Co.* 477

10. Where in an action by an abutting owner against an elevated railroad company to restrain the operation of its road in a street, the question of fee damages is gone into for the purpose of determining the sum to be paid by defendant for a conveyance of plaintiff's rights in the street of which he has been deprived, the opinions of witnesses as to what plaintiff's premises would have been worth if they were unaffected by the road and its operation, is incompetent. *Jefferson v. N. Y. E. R. R. Co.* 483

11. To questions calling for such testimony defendant objected, "as incompetent * * * and conjectural, * * * and not within the competency of any witness." *Held*, that the objections were sufficient to present the question. *Id.*

HUSBAND AND WIFE.

The publication upon which an action for libel was based suggested improper relations between plaintiff and one S. The husband of plaintiff was called as a witness by defendant, and asked if he had any dispute or conversation with his wife in relation to S. This was objected to and excluded as incompetent under the provision of the Code of Criminal Procedure (§ 831), prohibiting a husband or wife from disclosing, without the consent of the other, a confidential communication made by one to the other. *Held*, no error. *Warner v. Press Publishing Co.* 181

INDIANS.

1. In an action of ejectment brought by plaintiff pursuant to the act of 1845 (Chap. 150, Laws of 1845),

plaintiff claimed title under the treaty of 1802, between it and the Holland Land Company, and a deed executed in pursuance thereof by which a portion of the south line of the lands reserved and released to said plaintiff is described as running west from a post a certain number of chains. The description closes with a statement that the lands described were to be held by plaintiff "in the same manner and by the same terms as the lands reserved" by plaintiff by a treaty or convention entered into September 15, 1797. The description also referred to a meridian line in the east line of the tract and to artificial monuments placed at the corners. Under the treaty of 1797 a survey of the lands was made and the line plainly marked; the meridian line referred to in the treaty of 1802 was located by and the monuments placed under that survey. If the south line was to be taken as a straight one between the two points given, the land in question would be included in the reservation, but it was not included by the south line as shown by the survey. It also appeared that the south line as defined by the marks and monuments had been treated and designated as the southern boundary from the earliest time within the memory of witnesses; that a fence had been erected upon it in 1829, which has since remained, and the lands south of it have been occupied by defendant and his predecessors in title. *Held*, that the evidence authorized the conclusion that the line as surveyed was the southern boundary of the reservation, and so sustained a verdict for defendant. *Sneea Nation Indians v. Hugaboom*. 492

2. Pursuant to an act of congress of 1878 (Chap. 139), authorizing a re-survey of the reservation, a survey was made and duly approved; by this the south line in question was run as a straight line; plaintiff claimed under this survey. *Held*, that the survey so made did not, by changing the location of the line, have the effect to enlarge the reservation. *Id*.

3. It was claimed on behalf of plaintiff that the Indians, being wards

of the nation, could not be bound by practical location founded on acquiescence. *Held*, untenable; that as plaintiff's right to sue was given by and dependent upon the said act of 1845, which provides that actions "may be brought and maintained * * * in the same manner * * * as if brought by citizens of the state," in adopting the remedy, it was taken subject to the conditions. *Id*.

INJUNCTION.

1. One B. owned a block of land in the city of New York, which he divided into lots for private residences and conveyed to different parties by deeds, each of which contained a covenant on the part of the grantee, his heirs and assigns, not at any time thereafter to erect, suffer or permit upon the premises conveyed any tenement-house, which covenant it was agreed should run with the land. In an action against one who, through various mesne conveyances, all of which contained said restrictions, had become the owner of a lot in said block, brought by the owner of another lot, used as a private residence, to restrain a violation of the covenant, it was proved that the entire surrounding neighborhood had been mostly built up with flats or tenement-houses; that the tenement-house defendant was building was a large one, and he had expended large sums thereon. The trial court refused a permanent injunction, but fixed the permanent damages, *i. e.*, the difference in value of plaintiff's premises with and without defendant's tenement building, and awarded an injunction restraining the defendant from renting her building to any tenant until such damages and the costs were paid. *Held*, no error; that the court in awarding damages was not confined to those sustained before the commencement of the action. *Amerman v. Deane*. 355
2. The provision of the act authorizing the election of special county judges and surrogates in certain counties (Chap. 808, Laws of 1849, as amended by chap. 108, Laws of 1851), which provides that a special

surrogate so elected "shall possess all the powers and perform all the duties which are possessed and can be performed by a county judge out of court," was not repealed by the Code of Civil Procedure. *Aldinger v. Pugh.* 408

3. Accordingly *held*, that a special surrogate, elected for the county of Oneida, had power to grant an injunction in a case where the county judge would have had jurisdiction (Code Civ. Pro. 606), and that one violating an order so granted was properly adjudged in contempt. *Id.*
4. In an action to restrain defendant from so obstructing the waters of a creek as to cause them to flow back upon plaintiff's land, it appeared that G. formerly owned plaintiff's lot and that of defendant below. Upon the lot now owned by defendant was a mill and a dam which had been maintained for many years, which dam, when the pond was full, set back the waters of the creek upon the lot now owned by plaintiff. G. executed a mortgage upon part of plaintiff's lot, covering that portion so overflowed, without reserving the right to flow any part of it. At that time the mill was in operation, but the water in the pond was low. G. thereafter conveyed both lots to defendant. The mortgage was foreclosed, and, pursuant to judgment of foreclosure, the mortgaged premises were sold and conveyed by referee's deed to plaintiff. There was no reservation in the judgment, or in the referee's deed, of any right to flow any part of the premises. Prior to the sale and conveyance, the dam was carried away, and it did not appear that, at the time of the execution of the mortgage or the referee's deed, any portion of plaintiff's lot was overflowed, or that there was any visible sign of previous overflow. Defendant commenced rebuilding the dam with intent to carry it up to its former height. It did not appear that, in order to operate defendant's mill with substantially undiminished efficiency, it was necessary to maintain the dam at full height, or at such a height as would cause the overflow

of plaintiff's land. *Held*, that there was no implied reservation of the right to overflow; and that a permanent injunction was properly granted. *Wells v. Garbutt.* 430

INSANE PERSONS.

1. Assuming that a deed executed by an insane person is not voidable merely, but absolutely void, to establish its invalidity, it must appear that the grantor was, at the time he executed it, wholly, absolutely and completely unable to understand or comprehend the nature of the transaction. *Aldrich v. Bailey.* 85
2. The parties entered into a contract by which plaintiff agreed to sell and defendant to purchase a certain lot in the city of New York; the latter refused to perform the contract because of the filing of a *lis pendens* a few days before the making of the contract, in an action to have certain deeds and other instruments affecting the title to the block of which the lot formed a part, declared void. Neither the plaintiff here nor her grantor were made parties to that action. The complaint therein alleged that P., the former owner of the block, when he, by reason of extreme old age, was "mentally weak, incompetent and unsound of mind, incapable of attending to business personally, and incapable and incompetent to understand and comprehend properly the nature of a business transaction," and when entirely under the control of S., his agent, through force and fraud practiced upon him by S., who was bribed thereto by the defendant, acting in pursuance of a fraudulent scheme and conspiracy entered into between them to obtain title to the property, caused and influenced P. to make a contract agreeing to convey the property in question to E., one of the defendants, in exchange for other real estate, and subsequently procured P. to execute such a conveyance, which contract and conveyance was in fraud of the rights of plaintiff in that action as heir at law and legatee of P. *Held*, that the averments of the complaint were

t sufficient to justify a finding at P. was insane when he executed the contract and deed, but at the gravamen of the action as fraud; that, as it was conceded that plaintiff here took title to the estate in question in good faith, paying a full consideration, his title was not affected by the fraud (2 L. S. 137, § 5), and that plaintiff was entitled to a judgment for specific performance. *Id.*

The lunacy of a lessor does not discharge or affect his covenants in a lease executed before he was adjudged a lunatic; his estate, in the hands of a committee, will be liable for whatever damages his lessees have sustained because of a breach of a covenant for quiet enjoyment, and to the extent of such damages they are general creditors, and entitled to have their claim ascertained and paid in due course of administration. *In re Strasburger.* 128

4. The committee, however, owes no duty to the lessee of specific performance of the lunatic's covenants, and when the estate is chargeable with damages consequent upon their breach, it is entitled to the protection which the law extends to innocence in measuring such damages. *Id.*

5. S., who was the lessee of a building in the city of New York, sublet portions thereof to S. & A. D., which they in turn sublet to solvent tenants at largely advanced rentals. S. was thereafter adjudged a lunatic, and a committee appointed of his estate, which was insolvent. The D.'s made a payment of a quarter's rent in advance to the committee. The rent under the lease to S. not having been paid, he instituted summary proceedings to recover possession, and all the sub-tenants were dispossessed. Thereafter the committee, under order of the court, refunded to the D.'s the proportion of the rent so paid in advance for the portion of the quarter unexpired at the time of the dispossession. Upon a claim presented by the D.'s against the estate for damages, *held*, that they were entitled only to nominal damages. *Id.*

INSURANCE.

Plaintiff's complaint alleged in substance that, to induce defendant to employ him, he communicated to it, in confidence, a new system of soliciting insurance business; that defendant, without plaintiff's knowledge, commenced the use of the system, and continued its use against his protests after discovery, and thereby obtained a large amount of business. Plaintiff asked for an accounting and payment of a reasonable compensation. On demurrer to the complaint, *held*, that it did not set forth a cause of action. *Bristol v. Eq. L. Ass. Soc.* 264

INSURANCE (ACCIDENT).

Defendant issued a certificate of insurance by which it undertook to insure C. against personal bodily injury; in case death resulted from such injuries within ninety days, defendant agreed to pay plaintiff, the wife of C., \$5,000. The certificate provided that no suit should be brought to recover "any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury." C. received an injury December 10, 1887, which resulted in his death January 2, 1888. This action was commenced December 29, 1888. *Held*, that, so far as plaintiff was concerned, the action was to be commenced within one year after the injury to her, which was the death of her husband, and the action having been commenced within a year therefrom, this action could be maintained. *Cooper v. U. S. M. B. Assn.* 334

INSURANCE (FIRE).

1. A tenant who has agreed verbally with his landlord to keep the demised premises insured has an insurable interest in the property, and may insure in his own name to the extent of the amount agreed to be insured, and when no amount is named, his interest is the full value. *Berry v. Am. C. Ins. Co.* 49

2. Defendant issued to plaintiff a policy of insurance upon a building; the legal title thereto was in plaintiff's son. Plaintiff was in possession under a verbal agreement, whereby he was to occupy the premises during his life, and in consideration thereof to keep the building insured, in repair, and to pay the taxes. *Held*, that while the agreement might be, as between plaintiff and his son, void because not in writing, yet plaintiff, while in the unquestioned possession of the property, could not deny his liability, and so was bound to keep the building insured, and, therefore, had an insurable interest. *Id.*
3. The policy provided that it would be void if, without notice to the company and permission therefor indorsed on the policy, the interest of the insured was other than absolute ownership. The policy also provided that "no agent has any power to waive any condition of the policy;" and that no notice to, or consent of, any agent of the company shall bind the company until the notice or consent is clearly expressed and indorsed on the policy, signed by the agent. Plaintiff informed defendant's general agents, who issued the policy, that his son had bought the property for him; that he was to have it as a home as long as he lived, and was to insure it. *Held*, that this statement fairly gave notice that plaintiff was not the owner, and that, as part of the consideration for its use and possession, he had agreed to insure it; that this justified a finding that the condition as to title was waived; that the agents, having authority to make contracts without reference to the home office, their power to waive conditions in the policy were co-existent with that of defendant. *Id.*
4. The amount of insurance was \$1,100. A loss having occurred, plaintiff, upon the representations of the defendant's adjuster that the policy was void by reason of the breach of the condition as to title, agreed to accept \$400 in settlement of his claim. He received a draft for that sum upon defendant, drawn by its general agent, payable to his order, and executed a paper canceling the policy, which he delivered to the agent; thereafter he offered to return the draft and demanded full payment of the loss, which was refused. In an action to set aside the compromise and cancellation, and to recover upon the policy, the court found that the settlement was procured by the statement so made by the adjuster, and that plaintiff was entitled to the relief sought. *Held*, no error; that there was not simply a mistake, but a surrender of legal rights intentionally induced by false representation as to the law; that this constituted fraud. *Id.*
5. Plaintiff offered in his complaint to deliver up the draft, defendant claiming that as no proper or sufficient tender of the draft had been made before suit brought, the court had no power to grant relief. *Held*, untenable; that the offer in the complaint was sufficient. *Id.*
6. A contract of insurance, being an indemnity against an uncertain event, which, if it occurs, will cause loss to the assured, the latter must have such an interest in or relation to the insured property, that he will sustain a loss from the peril insured against. *Cross v. Nat. F. Ins. Co.* 133
7. An applicant for insurance is not bound to disclose the nature or extent of his interest to the insurer unless requested so to do; such interest may be shown by parol. *Id.*
8. In an action upon a policy of insurance issued by defendant upon certain premises to plaintiff, as "trustee," the following facts appeared: The premises had been conveyed to plaintiff to sell and distribute the proceeds as specified; he orally agreed, on receipt of the conveyance, to take possession of, care for, rent and keep the premises insured. Defendant's general agent, who issued the policy, knew that the premises were vacant and unoccupied, having personally examined the buildings and had notice of plaintiff's title;

he asked for no information and no representations were made to him. The policy provided that it should be void if the insured was not the sole and unconditional owner, or if the buildings were not on ground owned by him in fee, or if they should remain vacant or unoccupied. *Held*, that plaintiff had an insurable interest; and that the conditions as to plaintiff's title and the premises remaining vacant and unoccupied must be deemed to have been waived. *Id.*

— *When contract of insurance agent to purchase goods insured which have been damaged by fire, valid and enforceable against him.*

See Goodman v. Cohen.

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INSURANCE (LIFE).

1. By a policy of life insurance issued by defendant, the answers of the appellant to defendant's medical examiner were warranted to be true. In answer to the question "when last attended by a physician and cause?" the answer was "six years, measles." In an action upon the policy, for the purpose of proving the death, plaintiff produced in evidence a verified certificate, made about five months after the application, in which the attending physician stated that he had been the medical attendant or adviser of the decedent "for astralgia about one and a half years ago." *Held*, that the certificate could be availed of by defendant as evidence showing the falsity of the answer so made to the medical examiner; that the fact defendant would not have been permitted to introduce the statement in the certificate was not material; and, therefore, that a refusal of the court to charge, as requested by defendant, that this statement was to be taken into consideration by them was error. *Helwig v. Mut. L. Ins. Co.*

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2. In the absence of any agreement, a waiver of forfeiture of a policy of life insurance results only from negotiations or transactions with the insured, by which the insurer after knowledge of the forfeiture

recognizes the continued existence of the policy, or does acts based thereon, or requires the insured by virtue thereof, to do some act or incur some expense or trouble. *Ronaki v. Mut. R. F. L. Assn.* 378

3. In an action upon a policy or certificate of insurance, issued by defendant upon the life of R., these facts appeared: Defendant's constitution, which, by the terms of the policy, is made part of the contract, provides that if any of the conditions of the certificate or of the constitution are violated by a member, the membership shall at once cease and the certificate be void; with power in the executive committee to reinstate the delinquent member "upon satisfactory evidence of good health." After expiration of the time for payment of annual dues, G.'s employer, at his request, paid to defendant such dues, stating that R. had a swollen foot and had been on "his annual spree;" he received a receipt therefor, which stated that as the time for payment had expired, the receipt was given on condition that the member was at the time "in as good health as when received as a member;" otherwise that the payment and receipt should be null and void. R. was at the time sick of a disease of which he died the next day. *Held*, that the forfeiture was not waived by the payment. *Id.*

4. Two days after the death defendant was informed thereof, and it furnished blanks for proofs of death, which were filled out and delivered to its representative, who said he would lay them before the proper board; these proofs stated the true cause of the death. Subsequently said representative furnished blanks for the certificate of the clergyman who presided at R.'s funeral, which was procured and delivered to said representative who stated that when defendant's president, who was then absent, returned, the board would meet, the claim be passed and probably paid, but subsequently when called upon by plaintiff's agent, he said the policy had lapsed for non-payment of dues and defendant tendered back the dues so paid. *Held*,

that there was no waiver, or evidence tending to prove it, authorizing the submission of the question to the jury. *Id.*

5. As mutual benefit life associations, incorporated under the act of 1888 (Chap. 175, Laws of 1888) are, by the terms of that act (§ 5), declared to be subject only to its provisions, they are not subject to the provisions of the act requiring notice of annual dues to be given in advance of the time when they fell due. (Chap. 841, Laws of 1876, as amended by chap. 321, Laws of 1877.) *Id.*
6. Where a policy of life insurance contains a promise to pay a certain specified sum, and this is followed by obscure clauses, difficult to be understood or requiring expert knowledge for their comprehension, they will not be construed as intended to impair the promise, but should receive the construction the insurer had reason to suppose was put upon them by the insured. To effect an impairment of the original obligation, the language of the subsequent clauses must be clear and unambiguous. *Wadsworth v. J. & T. Co.* 540

INSURANCE (MARINE).

1. O. & Co., who were insurance brokers and defendant's agents, issued to P., a forwarder in New York city, a "Uniform Canal Cargo Policy" of insurance, by which defendant agreed to insure the several persons whose names were indorsed thereon, or in a book provided for that purpose; no risk to be considered as insured unless the indorsement was approved and signed by the company or its authorized agents. A book was delivered with the policy, ruled in columns with printed headings, one being "Signature of Approval." In an action upon the policy, plaintiff's evidence was to the effect that by the course of business between P. and O. & Co., a cargo to be insured was entered by P. in this book, which was sent to O. & Co. for their approval. When the risk was taken for "the harbor of New York," the ap-

proval was denoted by the word "harbor" written in that column opposite the name of the assured and the boat or vessel insured. P., having loaded a canal boat, entered in said book the name of the boat, description of cargo, etc., and sent it to O. & Co., who wrote the word "harbor" in said column. Defendant's evidence was to the effect that the word "harbor" indicated an acceptance of the risk by insurers other than defendant, but that the insured had not been advised that such risks were not taken by defendant, and the insured had no other open policy or book. *Held*, that the evidence justified a finding that the risk was accepted by defendant. *Petrie v. Phenix Ins. Co.* 137

2. It appeared that during the season when this risk was taken, which was upon a cargo of cement, P. had been engaged in forwarding cargoes of cement to various points in the upper part of the harbor of New York, on the Harlem river and at Tarrytown. All of these cargoes had been insured through O. & Co. under the policy in question. In such cases the places of destination were not entered, but under columns in the book headed "from" and "to," the shipments were indicated by the words "from New York to harbor." Opposite the name of the boat in question in the column "from" was written, "from New York harbor," the last word extending into the column headed "to." *Held*, that, under the circumstances, the contract was not so indefinite and uncertain as to render it void. *Id.*
3. The cargo in question was shipped to Tarrytown. Evidence on behalf of plaintiff was offered and received to the effect that the term "harbor of New York," as used in the business of insurance, included Tarrytown and other points in the New York custom-house district. *Held*, that the evidence was competent. *Id.*
4. The canal boat arrived safely at Tarrytown and was moored alongside a dock; when the tide went out it grounded and was so injured that it sank and the cargo

was destroyed. It appeared that the boat was seaworthy when laden. The perils insured against were "of the seas, canals, rivers," etc. *Held*, that the loss was within the perils insured against. *Id.*

Defendant insured plaintiff's canal boat for one year from August 2, 1886, against perils of "rivers, canals and fires," excepting losses "arising from want of ordinary care and skill in loading and stowing cargo, * * * inherent defects and other unseaworthiness," and from "gangways * * * being improperly secured and protected." The policy authorized the carrying of lime in barrels. In May, 1887, the boat was loaded with quick-lime in barrels at a point on the Hudson river. Between three and four hours after the loading was completed, the hold of the boat was discovered to be on fire through the slacking of the lime; it was towed out into the river and sunk. This, it was conceded, was the only way to prevent total destruction of the boat by fire. In an action to recover the insurance, plaintiffs' evidence was to the effect that the lime was not wet while it was being transferred to the boat, and that the hatches were carefully closed; also that the boat was thoroughly repaired late in the summer before the loss. The boat was tested after it was discovered to be on fire and but one inch of water was found in the hold. There was no evidence as to the condition of the lime when it was delivered to the boat. No defects in the boat, or any unseaworthiness were shown; defendant, however, claimed that these were to be inferred from the slacking of the lime, which, if the lime was dry when loaded, must have been caused by water entering through a leak in the boat. The plaintiffs were nonsuited. *Held*, error; that the evidence did not justify a finding that the slacking was caused by a leak of sufficient size to make the boat unseaworthy; that some of it may have been wet before loading sufficiently to have caused it to slack. *Singleton v. Phenix Ins. Co.* 298

6. Also *held*, that the loss was by fire, within the meaning of the policy. *Id.*

7. *It seems* that it is not necessary to show actual ignition, or combustion to establish a loss by fire. *Id.*

8. It appeared that the day after the fire, defendant's agent, who issued the policy, was notified of the loss and examined the wreck; he received a verified statement of the circumstances of the loss, which, with a full statement of his own as to the condition, he mailed to defendant, by whom they were retained. Defendant's adjuster thereafter wrote to the agent that he had examined the boat and would "pick her up." *i. e.*, raise her. Plaintiffs verified formal proofs of loss and executed an assignment of all their interest in the boat to defendant, which was delivered to and retained by the agent. *Held*, that, a finding by the trial court, as matter of law, that the boat had not been abandoned by the plaintiffs, and that an abandonment had not been accepted by defendant, was error. *Id.*

INTOXICATION.

In an action, under the Civil Damage Act (Chap. 646, Laws of 1873), to recover damages for personal injuries alleged to have been received through intoxication caused by liquors sold by the defendant, the plaintiff must show that the furnishing of the liquor was, in whole or in part, the proximate cause of the intoxication and that the liquor was furnished to the individual whose intoxication inflicted or caused the injuries complained of. *Dudley v. Parker.* 386

LANDLORD AND TENANT.

1. The lunacy of a lessor does not discharge or affect his covenants in a lease executed before he was adjudged a lunatic; his estate, in the hands of a committee, will be liable for whatever damages his lessees have sustained because of a breach of a covenant for quiet en-

- joymont, and to the extent of such damages they are general creditors, and entitled to have their claim ascertained and paid in due course of administration. *In re Strasburger*. 128
2. The committee, however, owes no duty to the lessee of specific performance of the lunatic's covenants, and when the estate is chargeable with damages consequent upon their breach, it is entitled to the protection which the law extends to innocence in measuring such damages. *Id.*
 3. In the absence of fault upon the part of a lessor, the lessee can recover for a breach of a covenant of quiet enjoyment only such rent as he has advanced, and such mesne profits as he is liable to pay over. *Id.*
 4. *It seems* the acceptance by the landlord of the surrender of demised premises will prevent the recovery of rent thereafter accruing, and if the landlord takes possession after a surrender and re-lets the premises to another, he will be deemed to have accepted the surrender, unless there are facts rebutting this inference. *Underhill v. Collins*. 269
 5. Where, however, it appeared that the landlord refused to accept a surrender and notified the tenant that he would hold him for the rent, but stated that he would lease the premises for the tenant's benefit, and thereupon the latter left the premises and subsequently the landlord leased them to another, *held*, that there was no acceptance of the surrender; that the renting was for defendant's benefit and on his account; and that the landlord was entitled to recover the rent stipulated, less the amount received from the new tenant. *Id.*
 6. *It seems*, where a lessor of premises for a residence, knowing at the time of the execution of the lease of the existence of secret defects or conditions rendering the building unfit for a residence, fraudulently represents to the lessee that they do not exist, or fraudulently conceals their existence, if the lessee abandons the house because thereof, he will not be liable for the rent subsequently accruing. *Daly v. Wise*. 306
 7. *It seems*, also, that in case a party for the purpose of inducing another to contract with him, states that a material fact does or does not exist, without having knowledge of the truth of the statement and without having reasonable grounds for believing it to be true, he is liable in fraud, if the statement is relied on and is subsequently found to be false, although he had no actual knowledge of its untruth. *Id.*
 8. A lessee occupying under a lease which contained no covenant that the premises were in good condition, abandoned the premises because of their unsanitary condition, resulting from defective plumbing. In an action to recover rent thereafter accruing, the defendant testified that plaintiff's agent represented that the plumbing was all in good condition; that it had been fixed as they thought it ought to be. It was not shown that plaintiff or the agent knew this statement to be false, or that it was made without actual or supposed knowledge, or that it was made in bad faith, or that the plumbing had not been fixed as stated. *Held*, that a verdict in defendant's favor was justified. *Id.*
 9. Plaintiff executed a lease, for a term of years, of certain premises, consisting of a factory, engine and boiler-house in which were an engine and machinery; the lease contained a covenant that the lessee would not make any alteration in the premises without the consent of plaintiff, "under the penalty of forfeiture." The engine being worn out and dangerous, the lessee requested plaintiff to share with him the expense of taking it out and putting in a new one; this plaintiff declined to do. Thereupon the lessee advised plaintiff by letter that it should remove the old engine, protect it from the weather, leave it upon the premises and substitute one of its own for use. Plaintiff replied that he had no objections to the exchange,

provided the new engine was placed on the same foundation and a receipted bill given to him therefor. The old engine was so affixed to the foundation that it could be removed and a new one substituted without injury to the foundation or the building. The lessee removed the old engine, placed it under cover, and put in a new one on the old foundation. In an action to restrain defendant, who had succeeded to the rights of the lessee, from removing the new engine from the premises, *held*, that the substitution thereof was not necessarily an alteration, and as it appeared that no substantial alteration was made, and that, on removal of the new engine, the old one could be replaced, plaintiff's consent to the substitution was not requisite; that, therefore, there was no legal obligation resting upon the lessee which would necessarily charge it with the terms or conditions upon which plaintiff assumed to consent; that as the lessee did not in fact accede to those terms, but proceeded upon a declared purpose to the contrary, plaintiff took no title to the engine; that the lessee had the right to make the change and defendant to remove the new engine; and so, that the action was not maintainable. *Andrews v. Day Button Co.* 348

See LEASE.

LEASE.

1. Where a lease of the whole of an unfurnished dwelling for a definite term contains no covenant on the part of the lessor that the premises are in good condition, or that he will put or keep them so, a covenant may not be implied that the dwelling is without inherent defects, rendering it unfit for a residence. *Daly v. Wise.* 306
2. The covenant of a landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach. *Sterger v. Van Sicken.* 499

See LANDLORD AND TENANT.

LEGACIES.

See WILLS.

LIBEL

1. While ordinarily in an action of libel, the question whether the publication complained of was privileged, is one of law for the court, where the facts upon which defendant bases the claim of privilege are disputed by plaintiff, it is for the jury to determine as to the existence of these facts. *Warner v. Press Publishing Co.* 181
2. An imputation of malice arises from proof in an action of libel that the libelous publication is false, and when testimony is given on the part of defendant tending to prove the absence of actual malice, the question as to whether malice existed is one of fact, and if found to exist, the jury in their discretion may award exemplary damages. *Id.*
3. A libel recklessly or carelessly published, as well as one induced by personal ill will, will support an award of exemplary damages. *Id.*
3. In such an action, based upon an article in a newspaper published by defendant, accusing the plaintiff, a married woman, of unchastity, plaintiff's evidence showed the article to be false. Defendant gave evidence tending to prove the absence of actual malice on its part. The court was requested by defendant to charge that if the jury found it was not actuated by actual malice against plaintiff, they cannot award any damages for injured feelings or mental or bodily suffering; this was refused. *Held*, no error. *Id.*
5. The libelous article suggested improper relations between plaintiff and one S. The husband of plaintiff was called as a witness by defendant, and asked if he had had any dispute or conversation with his wife in relation to S. This was objected to and excluded as incompetent under the provision of the Code of Criminal Procedure

(§ 881), prohibiting a husband or wife from disclosing, without the consent of the other, a confidential communication made by one to the other. *Held*, no error. *Id.*

LICENSE.

1. Where one enters upon the premises of another as a mere licensee, without any enticement or inducement, he does so at his own risk, and as to him the owner owes no duty of care or vigilance. *Sterger v. Van Sicklen.* 499
2. The fact that the premises are leased with a condition that the owner may re-enter to make repairs, does not enlarge his responsibility as to third persons. *Id.*
3. In an action to recover damages for personal injuries, the following facts appeared: Defendant owned certain premises, which he had leased to one L.; the steps leading from a stoop in the rear of the building on the premises to the ground were decayed; defendant knew of this and had agreed to repair them. Plaintiff occupied the adjoining premises, the two lots being separated in the rear by a fence through which an opening had been made by knocking off boards. Plaintiff went through said opening to defendant's house, not at the occupant's invitation or on a matter of common interest, and on coming out one of the steps broke and she received the injuries complained of. The complaint was dismissed. *Held*, no error; that plaintiff was a mere licensee and no duty was imposed upon defendant requiring the exercise of any care to protect her. *Id.*

LIEN.

See ATTACHMENT.

BAILMENT.

CHATTEL MORTGAGE.

MECHANIC'S LIEN.

MORTGAGE.

LIMITATION OF ACTIONS.

1. Defendant issued a certificate of insurance by which it undertook

to insure C. against personal bodily injury; in case death resulted from such injuries within ninety days, defendant agreed to pay plaintiff, the wife of C., \$5,000. The certificate provided that no suit should be brought to recover "any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury." C. received an injury December 10, 1887, which resulted in his death January 2, 1888. This action was commenced December 29, 1888. *Held*, that, so far as plaintiff was concerned, the action was to be commenced within one year after the injury to her, which was the death of her husband, and the action having been commenced within a year therefrom, this action could be maintained. *Cooper v. U. S. M. B. Assn.* 334

2. In an action, commenced in 1887, to recover an alleged balance unpaid of the purchase-price of a farm sold and conveyed in 1880, by plaintiff, to defendant, defendant set up as a counter-claim, and the referee found in substance that the sale was by the acre, that plaintiff represented that there were 230 acres in the farm, and relying thereon he agreed to pay for that number, that shortly before the commencement of the action he discovered that there were only about 211 acres. Defendant demanded a reformation of the contract and an allowance for the deficiency. Plaintiff in reply to the counter-claim pleaded the Statute of Limitations. *Held*, untenable; that the contract having been executed, defendant had no relief except in equity, and that the ten years limitation applied. *Gallup v. Bernd.* 370

LONG ISLAND CITY.

1. Under the provision of the act of 1886 (§ 15, chap. 656, Laws of 1886), confirming "with interest thereon allowed by law" unpaid taxes in Long Island City, which were laid or levied prior to 1883, interest was properly chargeable on such taxes. *Collins v. Long Island City.* 821

2. In an action to set aside certain tax sales of lands in said city for unpaid taxes for the year 1888, it appeared that the lands were unoccupied and were owned by a non-resident. The name of the owner was inserted in the assessment-roll. It was claimed by plaintiff that this rendered the assessment void. *Held*, untenable; that as under the provision of the charter of said city (§ 6, tit. 6, chap. 461, Laws of 1871), giving to the city assessors all the power of town assessors, this exception is made: "That lands of non residents shall not be separated from other assessments," and as the lands were properly placed in the roll, and every fact stated necessary to make a valid assessment, the insertion of the owner's name was surplusage, which did not affect the validity of the assessment. *Id.*

3. *It seems* that if the statement of the owner's name had the effect to initiate a personal charge against him, his remedy is by proper proceedings to set aside the tax as against him, to restrain its collection, or to recover damages in case it had been enforced. *Id.*

LUNATICS.

See INSANE PERSONS.

MASTER AND SERVANT.

1. *It seems* that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service, with knowledge of the character of defective structures and of the dangers which may be apprehended, he assumes the hazards incident to the situation. *Davidson v. Cornell.* 228
2. Where, however, although the defect is apparent, it may require skill and judgment, not possessed by ordinary observers, or by the servant, to give knowledge of hazards which may be apprehended therefrom, he does not assume those hazards. *Id.*
3. Reasonable care, and not the highest efficiency which skill and foresight can produce is the measure of a master's liability to his servant; he performs his whole duty by using as much care in the selection of materials for the use of his servants as a man of ordinary prudence in the same line of business would, acting with regard to his own safety, use in supplying similar things for himself, were he doing the work. *Carlson v. Phoenix Bridge Co.* 273
4. If material of the best quality is purchased by the master, and there is nothing in its appearance to indicate inefficiency, and tools, for the use of the servant, are constructed therefrom by competent and skilled workmen, the master discharges his duty, and is not liable for an injury to the servant, caused by a breaking of the tool in consequence of a hidden defect in the material. *Id.*
5. Plaintiff was employed as a brakeman upon one of defendant's freight trains. One of its printed rules required brakemen, before starting, to test the hand brakes, "and see that they are in proper condition and work easily." This was not done by plaintiff or any of the brakemen upon the train in question. The train stopped for about two hours at a station where the cars were usually inspected, but no inspection was made. The train stopped at another station, just beyond which was a steep down grade, but although plaintiff and his associates well knew of this grade and of the dangers incident to an attempt to take such a train down without the brakes being in good order, and also, that the brakes of heavily loaded moving cars were apt to get out of order, made no examination. Upon attempting to set the brakes, after the train started upon the down grade, it was discovered that a number of them would not work, and in consequence the speed of the train could not be checked, a greater portion of it was thrown from the track and plaintiff was injured. In an action to recover damages, it appeared that plain-

tiff knew of and had read the printed rules. *Held*, that as disobedience of the rules caused the accident, plaintiff was not entitled to recover. *La Croy v. N. Y., L. E. & W. R. R. Co.* 570

6. It seems that had plaintiff been unacquainted with the rules he would not be entitled to recover, as with full knowledge of the dangers, it was incumbent upon him and his associates to ascertain before reaching the down grade that a sufficient number of the brakes to properly check the train were in order. *Id.*

7. Plaintiff was a gangwayman in the employ of one L., a stevedore, engaged in unloading a vessel belonging to defendant. Under his agreement with defendant, L. was to be paid a stipulated price per ton for unloading, defendant to furnish the steam power and a man to run the winch. Plaintiff gave the signals to the winchman. Plaintiff, to hoist a load, gave the signal to go ahead, which was done by the rope winding around the drum of the winch. In hoisting the load in question the rope ran off the drum. The winchman stopped and called plaintiff's attention to this. The latter supported the hoist by means of a hook and then seized the rope to lift it on to the drum, ordering the winchman to back so as to loosen the rope. Instead of doing so the winchman went ahead and plaintiff's hand was drawn against the drum and he was injured. In an action to recover damages, it did not appear that L. had power to order or control the winchman, further than to signal to him through the gangwayman. *Held*, that the winchman could not be regarded as the servant of L.; that the fact that he received orders when to hoist or lower from plaintiff did not change his relations to defendant as its servant, and that as his negligence caused the injury defendant was liable. *Johnson v. Netherlands A. S. N. Co.* 576

— Contract for services construed, and as to what amounts to and the nature and effect of a termination thereof. See *Miller v. U. S. & S. Co.* (Mem.)

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MECHANICS' LIEN.

By a building contract, the contractor agreed "to put in a sewer" to connect the houses to be erected with another sewer, and to make water connections. At the time of filing a mechanic's lien, there was nothing due under the contract, and all the payments called for by it had been made, except a sum due when the contract was completed. The contractor substantially performed the contract in other respects, but omitted to put in the sewer or make the water connections, and the owner, after notice to the contractor, completed the work in these respects at an expense of \$180. The whole contract price was \$2,850. The owner had paid \$2,020. There was no provision in the contract that the owner should complete the work in case the contractor failed to do so, or any understanding that the former should proceed with the work, or any failure on his part to perform his obligations under the contract. In an action to foreclose the lien the court adjudged plaintiff to be entitled to a lien for the difference between the balance unpaid on the contract and the sum expended by the owner to complete it. *Held*, error; that plaintiffs' right to recover depended upon the performance of the contract by the contractor; and that there was not a substantial performance by him. *Hollister v. Mott.* 18

MISTAKE.

1. In an action, commenced in 1887, to recover an alleged balance unpaid of the purchase-price of a farm sold and conveyed in 1880, by plaintiff to defendant, defendant set up as a counter-claim, and the referee found in substance that the sale was by the acre, that plaintiff represented that there were 280 acres in the farm, and relying thereon he agreed to pay for that number, that shortly before the commencement of the action he discovered that there were only about 211 acres. The referee found that the agreement was the result of a mutual mistake. Defendant demanded a reformation of the

contract and an allowance for the deficiency. *Held*, the defendant was entitled to the relief sought. *Gallup v. Bernd.* 370

2. Also *held*, that the correction of the mistake sought for could be made as well upon answer as in a suit brought directly for that purpose. *Id.*

MONEY HAD AND RECEIVED.

By virtue of a levy under an attachment brought by plaintiffs, the sheriff received \$900. Defendants, as subsequent lienors, moved to vacate the attachment and procured an order restraining the sheriff from paying over the money to plaintiffs. The motion to vacate was granted and the sheriff thereupon paid over the money so received to defendants. Upon appeal the order vacating the attachment was reversed and the motion denied. Plaintiffs, pending the appeal, recovered judgment in their attachment suit, an execution thereon was returned wholly unsatisfied and their judgment remains unpaid. *Held*, that an action as for money had and received was maintainable to recover the moneys so paid to defendants; that the right of action was not affected by the fact that at the time the money was paid over to defendants, plaintiffs had only a lien upon it; that while the erroneous order was a protection to the sheriff, it was not such to defendants; that they having received the money with knowledge of the facts, and that if the order by virtue of which they received it should be reversed, plaintiffs would be entitled to it, a promise of restitution would be implied, running to plaintiffs, who could enforce it without the intervention of the sheriff. *Haebler v. Myers.* 363

MORTGAGE.

1. Where the whole amount secured by a mortgage on real estate is due, a tender of the same by the owner of the mortgaged premises extinguishes the lien of the mortgage, although the tender is not kept good; but it does not dis-

charge the promise or covenant to pay the debt, and for this the debtor remains liable. *Nelson v. Loder.* 288

2. If the debtor wishes to extinguish his liability for subsequently accruing interest, or to demand some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time; and so, must keep the tender good. *Id.*
3. The right of a subsequent lienor to redeem from a mortgage is derived from the owner of the mortgaged premises, and he is in this respect in no better position than the owner; if, therefore, he wishes to stop interest or compel an assignment of the prior lien, any tender he may make must be as absolute and specific as one made by the owner with like intent. *Id.*
4. B. purchased certain premises, subject to a mortgage thereon. After the commencement of an action of foreclosure by the defendant here, who owned the mortgage, B. executed to plaintiff a mortgage on the premises, who exhibited the same to defendant, tendered to her an amount sufficient to pay the sum due on her mortgage, with costs then accrued of the foreclosure suit, and demanded an assignment of her mortgage and the accompanying bond, which she refused. The tender was not kept good, but the money was deposited by plaintiff in his general bank account. In an action to compel an acceptance of the tender and an assignment by defendant of her securities, *held*, that plaintiff was entitled to the assignment, on payment to defendant of the amount due on her bond and mortgage with interest up to the time of payment and foreclosure costs. *Id.*
5. A mortgage, the expressed consideration of which was \$15,000, was given as security for the payment "of any and all notes, checks and drafts" indorsed by the mortgagee for the accommodation of the mort-

gagor, or of any firm in which he "is interested or in any manner connected." At the time it was given there was but one note outstanding; this was for \$3,000, indorsed by N., the mortgagee, for the benefit of the mortgagor, and was paid by the latter. Subsequently the mortgagor executed another mortgage to D. N. thereafter, without notice of the second mortgage, and before it was recorded, indorsed other notes for the mortgagor, which he paid. In an action to foreclose the first mortgage, *held*, that as between the parties it was proper to show the circumstances, to aid in ascertaining the intent of the parties, and viewed in their light, the intent appeared to be to cover future as well as existing indorsements; also, that as plaintiff was not affected by the mortgage to D. the same rule of construction applied as to the latter; and that plaintiff's mortgage was a valid and prior lien. *Marr v. Nichols*.

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6. In an action to foreclose a mortgage executed by defendants, who were husband and wife, upon lands of the latter to secure their joint bond, the wife, who alone answered, alleged that part of the consideration of the bond and mortgage was a gambling debt due the mortgagee from the husband, and that, at the time of the execution of the bond and mortgage, the persons who would have been entitled to the mortgaged premises were the defendant's four children. The mortgagee died prior to the bringing of the action. Upon the trial the wife called the husband as a witness to prove the averment as to the consideration of the bond and mortgage; this was objected to and the testimony excluded on the ground that the witness was incompetent under the Code of Civil Procedure (§ 829) to testify to conversations or transactions between him and the deceased mortgagee. *Held*, no error; that the provisions of the Revised Statutes (1 R. S. 663, §§ 16, 17), upon which the defense was based, which declare all things in action and securities, any part of the consideration for which is money won

by playing at any game, to be "utterly void," except where the security affects real estate, when it shall be void as to the grantee, but shall inure to the sole benefit of the person entitled to the real estate in case the grantor or incumbrancer had died immediately upon the execution of the instrument, could not be construed as operative to transfer to the mortgagor's heirs title to the mortgage alone, leaving the bond valid in the hands of the obligee; that the mortgage being merely an incident of the debt, the necessary effect of the statute is that the bond goes with it to the mortgagor's heirs, not absolutely, but only so far as necessary to give validity to the mortgage, and in case the amount of the debt exceeded the value of the land mortgaged, to the extent of the excess, the bond, if the defense was sustained, would be utterly "void," and as judgment was sought against the witness for any deficiency, he was directly interested in the event of the action. *Luetehford v. Lord*.

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7. L. conveyed certain premises to S. T. and H. by deeds absolute on their face in pursuance of an agreement, by which she contracted to so convey as security for a loan which the grantees agreed to, and did make said loan to be for a period not exceeding one year from the date of the deed. Upon repayment of the loan with the interest the grantees agreed to reconvey; but in case it was not repaid within the year, the grantor agreed that the deed should become absolute and that the grantees, their heirs and assigns, should become the owners in fee simple absolute. The loan was not repaid within the year and thereafter the grantor surrendered possession of the premises to the grantees. Plaintiff levied upon the premises, by virtue of an attachment against L. as a non-resident, in an action wherein the summons was served by publication, obtained judgment by default, and issued execution thereon. In an action to have said deeds declared to be mortgages, and the premises subjected to the lien of the plaintiff's judgment, *held*, that plaintiff was entitled to

the relief sought; that the deeds were mortgages; that the provision in the contract that if the loan was not repaid in the time specified they should become absolute conveyances, was ineffectual; that as, therefore, the title remained in L., the lien by virtue of the attachment was valid, and the judgment and execution became a specific lien upon the land. *Macaulley v. Smith.* 524

The grantees before the attachment was issued executed a deed of the premises to the defendant, the N. Y. B. Union. The grantee had no notice of the agreement; it admitted that a portion of the purchase-money, agreed by it to be paid, remained unpaid. *Held*, that said defendant could not maintain the defense; that it was not a *bona fide* purchase for value, as in order to sustain that relation, it must have paid all of the purchase-money; but that to the extent of its payments innocently made before notice of plaintiff's claim it was entitled to protection. *Id.*

MUNICIPAL CORPORATIONS.

While the Hudson river is a highway for the passage of vessels, that portion of it which is embraced within the boundaries of a city is not one of its highways, so as to burden it with the duty of removing obstructions and keeping it safe for navigation. *Coonley v. City of Albany.* 145

While the state may undertake, at its own expense, to remove obstructions in, and improve the condition of navigable waters, and may impose this burden upon a city or county more immediately and beneficially interested therein than other portions of the state, in order to charge a municipality with this duty, the legislative intent so to do it must appear from the act relied upon as imposing the duty. *Id.*

See ALBANY (CITY OF).
LONG ISLAND CITY.
NEW YORK (CITY OF).

NAVIGATION.

1. While the Hudson river is a highway for the passage of vessels, that portion of it which is embraced within the boundaries of a city is not one of its highways, so as to burden it with the duty of removing obstructions and keeping it safe for navigation. *Coonley v. City of Albany.* 145
2. While the state may undertake, at its own expense, to remove obstructions in, and improve the condition of navigable waters, and may impose this burden upon a city or county more immediately and beneficially interested therein than other portions of the state, in order to charge a municipality with this duty, the legislative intent so to do it must appear from the act relied upon as imposing the duty. *Id.*

See STEAMSHIP COMPANIES.

NEGLIGENCE.

1. In an action by a father to recover damages for injuries to an infant child, caused by defendant's negligence, he is entitled to recover his pecuniary loss, *i. e.*, the value of the services of the child while incapacitated because of the injury and the reasonable expenses necessarily incurred in the effort to restore the child to health. *Barnes v. Keene.* 13
2. The amount of the loss recoverable is not affected by the financial condition of the parent. *Id.*
3. Defendant indorsed and delivered to plaintiffs a warehouse receipt for certain wet salted calf skins as security for a call loan. In an action to recover on the loan, defendant sought to counter-claim damages resulting from a deterioration of the calf skins while in the warehouse, alleged to have been caused by plaintiffs' neglect to care for them. It appeared that plaintiffs gave no personal attention to the skins while in the warehouse and exercised no supervision over them; that defendant had free access to them and frequently went

to the warehouse and examined them. The skins were all piled together and the injury was caused by the heating of those in the center of the pile; this did not appear upon the surface of the pile. When defendant discovered that the skins were injured, he called plaintiffs' attention to it and advised that they be resalted or tanned; plaintiffs declined to do either; defendant also proposed to take them to his own warehouse and treat them. Plaintiffs did not consent, but suggested that defendant pay the debt and take the skins. *Held*, that while the legal title to the property was vested in plaintiffs and the warehousemen were their bailees, defendant had at least an equal interest in the preservation of the property, the bailment being for the mutual benefit of the parties, and no duty devolved upon the former to cause it to be handled over and inspected; that plaintiffs were not required to permit defendant to take it to his own warehouse, and whether, under the circumstances, it was their duty to take some action for its preservation after being advised of its deterioration, for neglect to perform which they were liable, was properly submitted to the jury. *Willets v. Hatch*. 41

4. By the statute of Great Britain, known as the "Passengers' Act 1855," every passenger ship is required to carry a duly qualified medical practitioner, and its owner or charterer is required to provide for the use of its passengers a supply of proper and necessary medicines for their medical treatment during the voyage, properly packed and placed under the charge of a medical practitioner, "to be used at his discretion." In an action to recover damages against a corporation of Great Britain for injuries alleged to have been sustained by plaintiff, a passenger on one of its steamers, alleged to have resulted from taking calomel furnished by the steamer's physician in response to a request for "quinine," it appeared that defendant issued a prospectus to advertise its line, which contained a statement that an experienced surgeon was carried on board each

ship and that all medicines were supplied gratis. *Held*, that defendant assumed no duty or liability beyond those imposed by the statute, *i. e.*, to employ a duly qualified physician, to provide a supply of suitable and necessary medicines, properly packed and labeled and to provide a proper place in which to keep them; and that, having complied with these requirements, for errors and mistakes on the part of the physician thereafter, it was not responsible. *Allan v. State S. S. Co.* 91

5. It appeared that in the outset of the voyage the medicines were inspected, as required by the statute, by the medical examiner at the port from whence the steamer sailed and they were then properly packed and labeled. Plaintiff produced evidence to the effect that on the evening when she applied for the medicine the "surgery" where the medicines were kept was in disorder and confusion, the bottles being out of place, and the trial court left it to the jury to determine whether the condition of the "surgery" was such as to show want of ordinary care on the part of defendant in providing and properly labeling medicines or left them open so that a mistake was likely to occur. *Held*, error; that the evidence of confusion and disorder after the steamer went to sea and after the medicines were put in charge of the physician, did not justify a finding of negligence on the part of defendant. *Id.*
6. A traveler approaching a railroad crossing guarded by gates, is not required to exercise the same vigilance in looking and listening as when the approaches are not so guarded. *Kane v. N. Y., N. H. & H. R. R. Co.* 160
7. In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, these facts appeared: plaintiff was driving along a highway, which crossed defendant's tracks, in an open wagon; the crossing was protected by gates on each side of the railroad; as plaintiff approached the

tracks he found the gates closed; a train passed, the gates were opened and plaintiff started on but after he had passed the first gate, both were again closed so that escape was impossible; he was struck by another train and injured. It was dark at the time of the accident, and the train which had passed obstructed the view of the approaching train; plaintiff and his witnesses testified that they neither heard nor saw the latter until a moment before the collision. *Held*, that the question as to plaintiff's contributory negligence was properly submitted to the jury. *Id.*

The court charged, on the question of damages, that plaintiff was entitled to recover for present pain and what he would endure in the future. *Held*, no error. *Id.*

Plaintiff did not claim on the trial any liability on defendant's part because of a failure to ring the bell or blow the whistle on the approaching train, but the ground of liability was the alleged mismanagement of the gates. Before the trial the provision of the act of 1854 (§ 7, chap. 282, Laws of 1854), requiring the bell to be rung or whistle sounded upon a locomotive approaching a highway crossing had been repealed. (Chap. 593, Laws of 1886.) Defendant's counsel requested the court to charge that it was not bound as matter of law to ring the bell or blow the whistle. This request was refused. *Held*, no error; as it had no bearing upon the issue. *Id.*

It seems, that a party having and assuming to maintain a dock and slip to supply wharfage for hire is bound to keep them in suitable condition for that purpose, and for any injury or loss resulting to a person properly using them, solely occasioned by a failure to perform this duty, he is liable. *Froman v. Rogers*. 167

The duty, however, is imposed upon one hiring wharfage to exercise ordinary care and, if by such exercise, he could have discovered the defect causing the injury, he

is guilty of contributory negligence. *Id.*

12. In an action to recover damages for an injury to plaintiffs' barge and its cargo while lying at defendant's dock, wharfage at which had been leased by plaintiffs, the testimony of the latter was to the effect that they made the lease upon the representation of defendant that the place at the wharf so let was safe and had six feet of water at low tide; that at the wharf it was less than six feet and the ground under the barge sloped down outward from the docks, so that at low tide the side of the barge near the dock rested on the bottom, and by reason of the slope broke away from its fastenings and turned over, thus causing the loss complained of. The barge had been at the dock for ten days prior to the injury, and at low tide had rested on the bottom. The court instructed the jury that if they found that the bottom of the slip was defective or in an unsafe condition, and this caused the loss, the further question was for them to determine whether defendant was guilty of negligence and plaintiffs free from contributory negligence. Plaintiffs' counsel requested the court to charge "that if defendant made the statement that this place was all right, the plaintiffs had the right to rely on that statement." The court stated that the jury might consider that on the question of negligence, and declined to charge that the jury might rely on the statement or that it relieved them from making a personal examination. *Held*, no error; that while assuming the statement was made, plaintiffs were justified in assuming it to be true, and negligence could not be imputed to them in placing the barge there without personal examination, the inference was justified that when previously at low tide the barge rested on the bottom, it could have been easily ascertained whether the ground beneath it was suitable to rest upon, and the question of contributory negligence was properly submitted to the jury. *Id.*

13. In an action to recover damages for alleged negligence, resulting

in setting on fire and destroying certain bearing fruit trees upon plaintiff's premises, plaintiff's witnesses were asked what the trees were worth at the time they were killed, and were permitted to answer under objection and exception. *Held*, error; that the evidence tended to show, not the value of the trees severed from the soil, but their value as bearing fruit trees connected with and dependent upon the soil; that this was not a proper measure of damages. *Dwight v. E., C. & N. R. R. Co.* 199

14. Plaintiff, while riding upon a load of hay along one of defendant's highways, was injured by being swept from the load by the limbs of a tree, which overhung the traveled track. On trial of an action to recover damages on the ground of alleged negligence of defendant's commissioners of highways, the court charged as follows: "Notice must be proven of the existence of the obstruction a sufficient length of time, from which a jury may say a commissioner ought to have known it. Now, it is nothing of any consequence that thousands have passed there without injury. If this obstruction existed so long that a vigilant officer should have known of its existence, they are liable." In accordance with requests of defendant's counsel, the court then charged in substance that the jury had a right to take into consideration, in determining whether the commissioners were chargeable with notice, the fact that people driving on loads of hay had passed under this tree without difficulty; also the fact that no complaint had been made to the commissioners. Said counsel then excepted to the sentence in the charge that "it is nothing of any consequence that thousands passed there without injury." *Held*, untenable. *Embler v. Town of Wallkill.* 222

15. It appeared that defendant had occasionally traveled on this highway, but never before on a load of hay, and he testified that he never had had occasion to observe how low the branches of the apple tree hung, or how far they extended.

Defendant's highway commissioners gave testimony to the effect that they had never known any difficulty from said tree, and that any danger therefrom was not obvious to them. Defendant claimed that the danger was so apparent that plaintiff and the driver of the load were, as matter of law, chargeable with contributory negligence. *Held*, untenable. *Id.*

16. Defendants were engaged in constructing an elevated railroad; they used for this work a steam engine and apparatus placed upon a platform on wheels, which moved along as the work progressed, upon girders resting upon cross-beams. While the platform was being moved forward the girders on which it rested gave way and the end of the platform fell to the ground. Plaintiff, an employe of defendants, at work upon the platform, where he had been employed for some time previously, was injured. In an action to recover damages plaintiff's evidence tended to show negligence on the part of defendants in not properly bracing the girders laterally, or bolting them to the cross-beams. *Held*, that while the alleged defects were apparent, yet as plaintiff, although having knowledge thereof, might not have been advised of the dangerous consequences that might result therefrom, and to give knowledge thereof, may have required some skill or judgment not available to him or to an ordinary observer, such consequences were not as matter of law obvious and within the hazards assumed, and the question of plaintiff's contributory negligence was one of fact for the jury; and so, that a motion for a nonsuit was properly denied. *Davidson v. Cornell.* 228

17. In an action by an employe of defendant to recover damages for personal injuries alleged to have been caused by defendant's negligence, the following facts appeared: Plaintiff, while in the performance of his duties, was injured by the fall of an iron girder caused by the breaking of an iron hook used in raising the girder. The hook was one of a

number made for defendant for such use from a bar of iron purchased by defendant of reputable dealers, and ordered as the "best refined" iron, which was the best grade in the market. All of the other hooks had been used for the same work, and none proved to be weak or insufficient, except the one in question, and this one, during the three months prior to the accident, had been used in lifting girders similar to the one which fell. There was nothing in its external appearance to indicate that it was weak, or not of the best material. The break resulted from a hidden defect in the iron, that could not have been discovered by an external examination, and was not discovered in the process of making the hook, which, when delivered to defendant's employees for use, was supposed to be of the best material. *Held*, that plaintiff was not entitled to recover. *Carlson v. Phoenix Bridge Co.* 278

An owner may ordinarily exercise such dominion over and make such use of his real estate as he chooses, provided the rights of others are not thereby violated, and the use of which he puts his property is not of such a public character that he is bound to observe reasonable care in keeping it in a condition to save harmless those invited to come upon it for his benefit and profit. *Sterger v. Van Sicklen.* 499

The covenant of a landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach. *Id.*

It seems that one who enters upon the premises of another upon lawful business, by the express or implied invitation of the proprietor, has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him, so that no injury may occur, and as to him the owner is chargeable with the duty of exercising that degree of care. *Id.*

Where, however, one enters upon the premises of another as a mere licensee, without any enticement

or inducement, he does so at his own risk, and as to him the owner owes no duty of care or vigilance. *Id.*

22. The fact that the premises are leased with a condition that the owner may re-enter to make repairs, does not enlarge his responsibility as to third persons. *Id.*

23. In an action to recover damages for personal injuries, the following facts appeared: Defendant owned certain premises, which he had leased to one L.; the steps leading from a stoop in the rear of the building on the premises to the ground were decayed; defendant knew of this and had agreed to repair them. Plaintiff occupied the adjoining premises, the two lots being separated in the rear by a fence through which an opening had been made by knocking off boards. Plaintiff went through said opening to defendant's house, not at the occupant's invitation or on a matter of common interest, and on coming out one of the steps broke and she received the injuries complained of. The complaint was dismissed. *Held*, no error; that plaintiff was a mere licensee and no duty was imposed upon defendant requiring the exercise of any care to protect her. *Id.*

24. Plaintiff was engaged in digging a trench in a street by the side of defendant's railroad track. A barrier of planks resting on sections of sewer pipe was erected around the excavation. As one of defendant's cars passed a piece of pipe fell into the trench, injuring plaintiff. In an action to recover damages plaintiff's evidence was to the effect that the car struck the pipe, causing its fall. Another car had just passed without striking the pipe. It appeared that when this car approached the excavation the driver stopped it, the conductor looked along the track and thought there was room to pass, and the foreman of the contractor who was making the excavation, signalled to the driver to come on; he drove along at a walk, passed two of the sections of pipe and struck the third. *Held*, that the evidence failed to estab-

lish negligence on defendant's part, and that the submission of the question to the jury was error. *Schmidt v. S. & H. P. R. R. Co.*

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25. Plaintiff was employed as a brakeman upon one of defendant's freight trains. One of its printed rules required brakemen, before starting, to test the hand brakes, "and see that they are in proper condition and work easily." This was not done by plaintiff or any of the brakemen upon the train in question. The train stopped for about two hours at a station where the cars were usually inspected, but no inspection was made. The train stopped at another station, just beyond which was a steep down grade, but although plaintiff and his associates well knew of this grade and of the dangers incident to an attempt to take such a train down without the brakes being in good order, made no examination. Upon attempting to set the brakes, after the train started upon the down grade, it was discovered that a number of them would not work, and in consequence the speed of the train could not be checked, a greater portion of it was thrown from the track and plaintiff was injured. In an action to recover damages it appeared that plaintiff knew of and had read the printed rules. *Held*, that as disobedience of the rules caused the accident, plaintiff was not entitled to recover. *LaCroy v. N. Y., L. E. & W. R. R. Co.* 570

26. *It seems* that had plaintiff been unacquainted with the rules he would not be entitled to recover, as with full knowledge of the dangers, it was incumbent upon him and his associates to ascertain before reaching the down grade that a sufficient number of the brakes to properly check the train were in order. *Id.*

27. Plaintiff was a gangwayman in the employ of one L., a stevedore, engaged in unloading a vessel belonging to defendant. Under his agreement with defendant, L. was to be paid a stipulated price per ton for unloading, defendant to furnish the steam power and a man

to run the winch. Plaintiff gave the signals to the winchman. Plaintiff, to hoist a load, gave the signal to go ahead, which was done by the rope winding around the drum of the winch. In hoisting the load in question the rope ran off the drum. The winchman stopped and called plaintiff's attention to this. The latter supported the hoist by means of a hook and then seized the rope to lift it on to the drum, ordering the winchman to back so as to loosen the rope. Instead of doing so the winchman went ahead and plaintiff's hand was drawn against the drum and he was injured. In an action to recover damages, it did not appear that L. had power to order or control the winchman, further than to signal to him through the gangwayman. *Held*, that the winchman could not be regarded as the servant of L.; that the fact that he received orders when to hoist or lower from plaintiff did not change his relations to defendant as its servant, and that as his negligence caused the injury defendant was liable. *Johnson v. Netherlands A. S. N. Co.* 576

NEW YORK (CITY OF).

1. By a contract for regulating and grading one of defendant's streets at a price specified for the different kinds of work, after providing for substantial performance in accordance with the specifications, it was stipulated that defendant's commissioner of public works should determine what would constitute a performance; daily inspection, a right on defendant's part to change the grade, and an examination by a surveyor after excavation, were also provided for, and when the completion of the work was duly certified by three of defendant's officers named, and also by its commissioner of public works, it agreed to pay therefor. In an action to recover for the work done at the contract prices, plaintiff produced in evidence the certificates required by the contract which showed the amount of work done, and certified to the completion of the contract and acceptance of the work. No fraud or

invalidity in the contract was alleged by defendant, and that the work as certified was done was not questioned, but it claimed on the trial non-compliance with this provision of the contract: "The street is to be regulated two feet below the grade where there is rock, and is to be examined by the surveyor before placing any filling thereon. * * * Any portion of the street not thus regulated and properly examined will not be received as finished." This defense was not set up in the answer. Defendant was permitted to give evidence, under objection that it was not admissible under the pleadings, which tended to show that in places rock was left nearer than two feet to the established grade. The court directed a judgment for plaintiff for the amount as certified, with interest. *Held*, no error; that defendant was not entitled to give evidence, or to go to the jury on the question of non-compliance with said provision of the contract as it was not raised by the pleadings, and that as the reception of the evidence was error, this court was precluded from considering it for the purposes of reversal. *Brady v. Mayor, etc.* 415

2. The specifications provided that the street was "to be regulated and graded, where required, in accordance with the plans and profile of the said street," and other portions of the contract showed that the specifications were not necessarily to be exactly but substantially performed to the satisfaction of the commissioner of public works. It appeared that the surveyor gave to the contractor the grade to which the work was conformed, and he certified to the completion of the work as stipulated. *Held*, that defendant was precluded by the certificates given as required by the contract; and that conceding the evidence so given by defendant was properly received and could be considered, it did not affect plaintiff's right of recovery. *Id.*
3. The contract provided that the city should not be "precluded or estopped by any return or certificate" of any of its officers, made

in pursuance of the contract, "from at any time showing the true and correct amount and character of the work." *Held*, that this provision did not have the effect to nullify defendant's agreement to be bound by the certificates of its officers as to performance, and did not affect the contractor's right to recover for the work done at the prices fixed, but that it simply reserved the right to challenge and to call upon the court to correct the certificates for error in these particulars: 1. As to the amount of the work, *i. e.*, the number of yards of filling and excavation, etc. 2. As to the character of the work, *i. e.*, that one kind of work had been estimated for another. *Id.*

OFFICE AND OFFICERS.

Under the provision of the act of 1875 (§ 10, chap. 611, Laws of 1875), providing for the incorporation of certain business corporations, which requires that the directors of a corporation organized under it shall, at their election, "and throughout their term of office," be stockholders, whenever, and as soon as, a director parts with all beneficial interest in and control over his stock and causes the officers of the corporation to have knowledge of such fact, by request that a proper transfer be made on the corporate books, the statute operates to divest him of his office, and he ceases to be a director. (BRADLEY, J., dissenting.) *C. N. Bank v. Colwell*. 250

PARENT AND CHILD.

1. In an action by a father to recover damages for injuries to an infant child, caused by defendant's negligence, he is entitled to recover his pecuniary loss, *i. e.*, the value of the services of the child while incapacitated because of the injury and the reasonable expenses necessarily incurred in the effort to restore the child to health. *Barnes v. Keene*. 13
2. The amount of the loss recoverable is not affected by the financial condition of the parent. *Id.*

8. In such an action it appeared that the father, who had had experience as a nurse himself, in that capacity took the entire charge of the child; after proving the value of his services as such, he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than would have been paid to a competent trained or professional nurse. *Held*, error; that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto what he might have made had he not abandoned the business engagement. *Id.*

PARTIES.

In an action upon a promissory note indorsed by defendant G., he answered to the effect that he held the legal title to certain letters patent owned by H., in order to affect a sale thereof for H.; that he sold an interest therein to the maker of the note, which was given in part payment; that at the request of H. the note was made payable to and was indorsed by G., in order simply to show that he had properly discharged the trust, and that the note was afterwards wrongfully diverted by H. The latter died before the trial. Upon the trial G., as a witness in his own behalf was asked how it happened that the note was made payable to his order. This was objected to and excluded as incompetent under the Code of Civil Procedure (§ 828). *Held*, no error. *Sallade v. Gertlach*. 548

PARTITION.

1. P. died leaving him surviving his widow, a daughter and five grandchildren, two of them children of the daughter, three the children of deceased sons; he died seized of four parcels of real estate. By his will he directed his executors, if his widow consented, to sell said real estate, invest one-third of the proceeds and pay the income there-

from to his widow during her life in lieu of dower; and after her death divide the principal among his grandchildren then surviving; one-third he gave to his daughter, the other third to his daughters-in-law and their children. The testator directed his executors to dispose of his residuary estate or put it in shape to divide equally among his said grandchildren "whenever either shall become of age." The will contained this clause: "It may so happen that my daughter * * * may live to have other children after my death, and after my executors may have divided my estate; in that case, it is my wish that they come in and share in the estate left my wife after her death in preference to the others, so that all my grandchildren may eventually receive the same amount." The widow refused to accept the provision made for her. In pursuance of a judgment in a suit for the partition and sale of the four parcels, three of them were sold, one-third of the proceeds being brought into court and the proceeds invested, the income to be paid to the widow during life as and for her dower interest. Thereafter, and during the life of the widow and before a division of the residuary estate, a child was born of the testator's daughter. *Held*, that the intent of the testator was to provide for every child born of his daughter after his death, and so that G., the child so born, was entitled to the benefit of the provision, although born before a division; also, that the refusal of the widow to accept the provision made for her did not operate to deprive the child so born of such benefit. *Hotaling v. Marsh*. 29

2. The original judgment in the partition suit provided that the principal of the one-third directed to be invested for the benefit of the testator's widow should at her death be divided among the survivors of the five grandchildren, "subject to open and let in and share in the same" any child the testator's daughter "shall have previously had lawfully born to her after the death of said testator, who shall then survive, and pro-

vided also that if previously to the birth of said after-born child a division of the residuary estate of the said testator shall have been made, * * * then said after-born child shall be preferred out of the said principal sum * * * to the extent, so far as may be, of making them equal with said five grandchildren." It was claimed that by this provision the after-born child could not share because born previous to the distribution of the residuary estate. *Held*, untenable; also, that if necessary, the court would have power to amend the judgment. *Id.*

PASSENGERS.

By the statute of Great Britain, known as the "Passengers' Act 1855" every passenger ship is required to carry a duly qualified medical practitioner and its owner or charterer is required to provide for the use of its passengers a supply of proper and necessary medicines for their medical treatment during the voyage, properly packed and placed under the charge of a medical practitioner "to be used at his discretion." In an action to recover damages against a corporation of Great Britain for injuries alleged to have been sustained by plaintiff, a passenger on one of its steamers, alleged to have resulted from taking calomel furnished by the steamer's physician in response to a request for "quinine," it appeared that defendant issued a prospectus to advertise its line, which contained a statement that an experienced surgeon was carried on board each ship and that all medicines were supplied gratis. *Held*, that defendant assumed no duty or liability beyond those imposed by the statute, i. e., to employ a duly qualified physician, to provide a supply of suitable and necessary medicines, properly packed and labeled and to provide a proper place in which to keep them; and that, having complied with these requirements, for errors and mistakes on the part of the physician thereafter, it was not responsible. *Allan v. State S. S. Co.*

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2. It appeared that in the outset of the voyage the medicines were inspected, as required by the statute, by the medical examiner at the port from whence the steamer sailed and they were then properly packed and labeled. Plaintiff produced evidence to the effect that on the evening when she applied for the medicine the "surgery" where the medicines were kept was in disorder and confusion the bottles being out of place, and the trial court left it to the jury to determine whether the condition of the "surgery" was such as to show want of ordinary care on the part of defendant in providing and properly labelling medicines or left them open so that a mistake was likely to occur. *Held*, error; that the evidence of confusion and disorder after the steamer went to sea and after the medicines were put in charge of the physician, did not justify a finding of negligence on the part of defendant. *Id.*

PLEADING.

1. The parties entered into a contract by which plaintiff agreed to sell and defendant to purchase a certain lot in the city of New York; the latter refused to perform the contract because of the filing of a *lis pendens* a few days before the making of the contract, in an action to have certain deeds and other instruments affecting the title to the block of which the lot formed a part, declared void. Neither the plaintiff here nor her grantor were made parties to that action. The complaint therein alleged that P., the former owner of the block, when he, by reason of extreme old age, was "mentally weak, incompetent and unsound of mind, incapable of attending to business personally, and incapable and incompetent to understand and comprehend properly the nature of a business transaction," and when entirely under the control of S., his agent, through force and fraud practiced upon him by S., who was bribed thereto by the defendant, acting in pursuance of a fraudulent scheme and conspiracy entered into between them to obtain title to the property,

caused and influenced P. to make a contract agreeing to convey the property in question to E., one of the defendants, in exchange for other real estate, and subsequently procured P. to execute such a conveyance, which contract and conveyance was in fraud of the rights of plaintiff in that action as heir at law and legatee of P. *Held*, that the averments of the complaint were not sufficient to justify a finding that P. was insane when he executed the contract and deed, but that the gravamen of the action was fraud; that, as it was conceded that plaintiff here took title to the lot in question in good faith, paying a full consideration, his title was not affected by the fraud (2 R. S. 137, § 5), and that plaintiff was entitled to a judgment for specific performance. *Adrich v. Bailey*. 85

2. The complaint herein alleged that plaintiff J. acquired title to certain premises subject to a mortgage, as devisee under the will of N., who died in 1880, which will was admitted to probate in February, 1880; that in May, 1880, defendant B., who then owned the mortgage, brought an action to foreclose it, fraudulently omitting to make J. a party, and by perjury obtained an adjudication that there was due thereon \$5,869.87, when in fact there was only about \$1,000 unpaid; that the purchaser on the foreclosure sale fraudulently executed a mortgage on the premises to defendant G., which was foreclosed without making J. a party, and the premises bid off and conveyed to C., the attorney of record for G. in that action; that several of the defendants who were named, including G., collected rents exceeding the amounts due on both mortgages. Judgment was demanded that the pretended mortgage to G. be canceled and stricken from the records; that defendants account for the rents and profits received by either of them; that plaintiffs be at liberty to redeem upon payment of whatever was found due, etc. Defendant G. demurred on the ground that two causes of action were improperly united, and that, as against her, it did not state facts sufficient to

constitute a cause of action. *Held*, untenable; that but one cause of action was stated, and that sufficient facts were stated to entitle plaintiffs, as against G., to an accounting. *Johnson v. Golder*. 116

3. G. claimed that it did not appear on the face of the complaint that plaintiff J. was the owner of the fee of the mortgaged premises and a necessary party to the foreclosure suit which was brought by B. in May, 1880, as it was not alleged that P., under whose will J. claimed to have acquired title, was then dead. *Held*, that the fair inference from the averments that P. died in 1880 and that her will was admitted to probate in February of that year, was that she died before the probate; that if a more precise statement was required, defendant should have moved to have the complaint in this particular made more definite and certain. *Id*.

4. In an action by a real estate broker, living and doing business in Pennsylvania, to recover the compensation agreed upon for his services in effecting a sale for defendant, of certain lands in that state, the answer alleged in substance that under the statute laws of that state, all persons are forbidden from engaging in that business, without paying the prescribed fee and receiving a commission, and also are prohibited from recovering any compensation or commission for such services, which statutes were referred to and the material provisions set forth, that plaintiff when he rendered the alleged services had not paid the fee, that the highest appellate court in that state had "in a proper case brought before it for review," decided that a real estate broker not having paid the fee or obtained a commission could not recover compensation. Upon demurrer to the answer, *held*, that it set forth facts sufficient to constitute a defense; that it was not essential to set forth the facts appearing in the case referred to, or to give its title or where reported; but the averment that the courts of Pennsylvania had in "a proper case" made the decision was suffi-

ient to allow proof that a decision had been made decisive of this case. *Angell v. Van Schaick*. 187

H. held the title of certain lots in the city of B., as security for an indebtedness of J. At the request of J., and upon the agreement of plaintiff to pay the indebtedness, he conveyed the lots to defendant, who agreed to hold them for plaintiff's sole use and benefit, subject to his direction respecting sales hereof, and to pay over the proceeds of such sales. Plaintiff paid J.'s indebtedness and from time to time negotiated sales of lots, which defendant deeded at his request. Plaintiff having negotiated a sale of the remaining lots, defendant refused to execute deeds to the purchasers unless the consideration was paid to his wife which was done, plaintiff advancing the money in order to procure the deeds. Plaintiff's complaint alleged the conveyance of the premises to defendant upon a trust substantially as stated, the sale of the remaining lots, the receipt by defendant of the purchase-money, and his refusal to pay over the same and then further alleged that defendant "has fraudulently and dishonestly appropriated the said moneys, and converted them to his own use." *Held*, that this averment did not necessarily characterize the action as one of trover; and that it might be rejected. *Bork v. Martin*. 280

Plaintiff's complaint alleged in substance that defendants, without probable cause, "wrongfully, unlawfully and maliciously begun an action" against plaintiff and caused him to be arrested and imprisoned under an order of arrest issued therein; that the order of arrest was vacated and plaintiff was discharged on the ground that it "was illegal, unauthorized, and that the court had no jurisdiction to grant the same." Two of the defendants set up as a counterclaim that plaintiff, as the manager of a certain firm, by fraud, deceit and false representations, induced defendants to sell it goods on credit, knowing that the firm would and could not pay; that after the receipt of said goods, the

firm and plaintiff, with intent to cheat and defraud and in pursuance of their intent not to pay, secretly disposed of said goods; that the matters so alleged constituted one of the causes of action for which the arrest complained of was made, and that the order of arrest was vacated, not on the ground that said allegations were untrue, but because of the misjoinder of causes of action and parties. *Held*, that a demurrer to the answer was properly sustained; that it did not, within the meaning of the Code of Civil Procedure (§ 501), set forth facts constituting a cause of action arising out of the transaction set forth in the complaint; nor was it connected with the subject of the action, whether it was to be considered as an action for false imprisonment or malicious prosecution; that the complaint and answer set forth distinct and independent torts, with no necessary or legal connection between them. *Rothschild v. Whitman*. 472

7. An omission of the averment in a complaint required by the provision of the Code of Civil Procedure (§ 549) authorizing the arrest of a defendant in an action for money received, that the money was received in a fiduciary capacity, and forbidding a recovery unless the allegation is proved, may not be taken advantage of for the first time upon appeal; the question must be raised upon the trial. *Moffatt v. Fulton*. 507

8. An express averment that the money was received in a fiduciary capacity is not necessary; a statement of facts showing that it was so received is sufficient, and is the proper pleading (PARKER, J., dissenting). *Id.*

9. Plaintiff's complaint alleged in substance that he intrusted his two promissory notes to the defendants, as his agents, to return one with certain explanations and to procure the other to be discounted and remit the net proceeds to him; that they procured both to be discounted, received the proceeds in trust to pay the same to plaintiff, but refused to pay them over on demand and converted them to

their own use. The facts proved on the trial were substantially as alleged, with the exception that it appeared defendants were authorized to procure the discount of either of the notes, and to return the other with the net proceeds of the one discounted. *Held* (PARKER and BRADLEY, JJ., dissenting), that the averments in the complaint and the proof were sufficient to authorize a judgment enforceable against the person of the defendant upon whom alone the summons in the action was served.

Id.

— *In action upon contract for services construed.*

See Miller v. U. S. & S. Co. (Mem.). 562

PLEDGE.

— *As to duty of creditor in caring for property delivered to him as security.*

See Willets v. Hatch. 41

POSSESSION.

— *When deed furnishes presumptive evidence of possession by grantee.*

See McRoberts v. Bergman. 73

— *As to sufficiency of possession to authorize the bringing of an action to determine conflicting clauses to real property.*

See Diefendorf v. Diefendorf 100

PRESUMPTIONS.

1. The fact of making a will raises a strong presumption against any expectation on the part of the testator of leaving or a desire to leave any portion of his estate beyond the operation of his will. *Schult v. Moll.* 122

2. Where the owner of two parcels of land imposes a burden upon one for the benefit of the other, and then conveys the former by absolute and unqualified deed, no easement in favor of the land retained against the parcel conveyed will be implied, unless at the time of the conveyance the burden was apparent, and is strictly necessary for the enjoyment of the parcel retained. *Wells v. Garbutt.* 480

3. Every party must be deemed to have intended the natural and inevitable consequences of his own acts, and so, when they are voluntary and necessarily operate to defraud others, he will be deemed to have intended the fraud. *Coursey v. Morton.* 556

— *As to presumption of possession of land under claim of title.*

See McRoberts v. Bergman. 73

PRINCIPAL AND AGENT.

An architect who is also employed by the owner as his agent and representative in the erection of a building, has authority to consent to the substitution of material inferior to that called for by the contract. *Thomas v. Stewart.* 580

— *When general agent of insurance company has power to waive condition in policy, although it provides that no agent has power to waive any condition.*

See Berry v. A. C. Ins. Co. 49
Cross v. N. F. Ins. Co. 133

PRIVILEGED COMMUNICATIONS.

The publication upon which an action for libel was based suggested improper relations between plaintiff and one S. The husband of plaintiff was called as a witness by defendant, and asked if he had had any dispute or conversation with his wife in relation to S. This was objected to and excluded as incompetent under the provision of the Code of Criminal Procedure (§ 881), prohibiting a husband or wife from disclosing, without the consent of the other, a confidential communication made by one to the other. *Held*, no error. *Warner v. Press Pub. Co.* 181

PROMISE.

See CONTRACT.

PUBLIC POLICY.

In an action to recover the alleged purchase-price of certain goods,

plaintiff's evidence was to the effect that his stock of goods, which was insured in four companies, having been damaged by fire, appraisers were appointed, one by plaintiff, and one, the defendant, by the companies; that in order to facilitate the adjustment, defendant agreed to and did purchase, for himself, a portion of the damaged goods, in respect to which the appraisers could not agree, at cost price, he agreeing to pay the purchase price to the companies in proportion to the amount of their respective policies, the amount to be included in the award as if the goods sold were a total loss. In respect to one of the companies, the financial condition of which was doubtful, defendant agreed that if it became insolvent within sixty days, so as not to pay its policy, he would pay its proportion to plaintiff. *Held*, that the agreement was not void as against public policy. *Goodman v. Cohen*. 205

QUESTIONS OF LAW AND FACT.

While ordinarily in an action of libel, the question whether the publication complained of was privileged, is one of law for the court, where the facts upon which defendant bases the claim of privilege are disputed by plaintiff, it is for the jury to determine as to the existence of these facts. *Warner v. Press Pub. Co.* 181

— When negligence a question of fact.

See *Willett v. Hatch*. 41
Davidson v. Cornell. 228

— When negligence a question of law.

See *Carlson v. P. Bridge Co.* 273
Schmidt v. S. & H. P. R. R. Co. 566

RAILROAD CORPORATIONS.

1. A traveler approaching a railroad crossing guarded by gates, is not required to exercise the same vigilance in looking and listening as when the approaches are not so

guarded. *Kane v. N. Y., N. H. & H. R. R. Co.* 160

2. In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, these facts appeared: Plaintiff was driving along a highway, which crossed defendant's tracks, in an open wagon; the crossing was protected by gates on each side of the railroad; as plaintiff approached the tracks he found the gates closed; a train passed, the gates were opened and plaintiff started on, but after he had passed the first gate both were again closed, so that escape was impossible; he was struck by another train and injured. It was dark at the time of the accident, and the train which had passed obstructed the view of the approaching train; plaintiff and his witnesses testified that they neither heard nor saw the latter until a moment before the collision. *Held*, that the question as to plaintiff's contributory negligence was properly submitted to the jury. *Id.*

3. The court charged, on the question of damages, that plaintiff was entitled to recover for present pain and what he would endure in the future. *Held*, no error. *Id.*

4. Plaintiff did not claim on the trial any liability on defendant's part because of a failure to ring the bell or blow the whistle on the approaching train, but the ground of liability was the alleged mismanagement of the gates. Before the trial the provision of the act of 1854 (§ 7, chap. 282, Laws of 1854), requiring the bell to be rung or whistle sounded upon a locomotive approaching a highway crossing had been repealed. (Chap. 593, Laws of 1886). Defendant's counsel requested the court to charge that it was not bound as matter of law to ring the bell or blow the whistle. This request was refused. *Held*, no error; as it had no bearing upon the issue. *Id.*

5. *It seems* that, under the provision of the General Railroad Act (§ 28, chap. 140, Laws of 1850), authorizing a corporation organized un-

- derit "to intersect, join and unite its railroad with any other railway," upon the grounds of the company owning the road so intersected and requiring the latter company "to grant the facilities" needed for the purpose, the right so provided for is an interest in lands and can only be created by a written instrument; a verbal agreement attempting to create it is void, under the Statute of Frauds. *Pt. J., M. & N. Y. R. R. Co. v. N. Y., L. E. & W. R. R. Co.* 439
6. In an action to recover damages sustained by means of the alleged unlawful severance by defendant of the connection of its railroad with that of the plaintiff, to compel defendant to restore the connection and to restrain further interference therewith, it appeared and was found that the original connection between the two roads was under a temporary parol agreement between the companies then owning them by which the owner of plaintiff's road was permitted to make the connection and to use the tracks, depot, yard and turn-table of the other company without charge; subsequently fifty dollars per month was charged for such use; when plaintiff took possession and asked permission of defendant to make use of the accustomed facilities, permission was granted upon plaintiff's agreement to pay \$100 per month, which was paid. Defendant thereafter notified plaintiff that, after a date specified, the use of such facilities could not be continued unless plaintiff would pay \$300 per month therefor, which, not having been paid, defendant, after giving notice to plaintiff to discontinue, itself severed the connection between the two tracks. *Held*, that the complaint was properly dismissed. *Id.*
7. In an action by an abutting owner to restrain the operation of defendant's elevated railroad, in a street in front of plaintiff's premises, for the purpose of showing the permanent or fee damages, plaintiff was permitted to testify that certain offers had been made to him for the premises before the construction of the railroad. *Held*, error; that the testimony was simply the declarations or opinions of others as to value; also, that for such a purpose offers might not be proved even by the parties making them. *Hine v. Manhattan R. Co.* 477
8. Where in an action by an abutting owner against an elevated railroad company to restrain the operation of its road in a street, the question of fee damages is gone into for the purpose of determining the sum to be paid by defendant for a conveyance of plaintiff's rights in the street of which he has been deprived, the opinions of witnesses as to what plaintiff's premises would have been worth if they were unaffected by the road and its operation, is incompetent. *Jefferson v. N. Y. E. R. R. Co.* 483
9. To questions calling for such testimony defendant objected, "as incompetent * * * and conjectural. * * * and not within the competency of any witness." *Held*, that the objections were sufficient to present the question. *Id.*
10. Plaintiff was engaged in digging a trench in a street by the side of defendant's railroad track. A barrier of planks resting on sections of sewer pipe was erected around the excavation. As one of defendant's cars passed a piece of pipe fell into the trench, injuring plaintiff. In an action to recover damages plaintiff's evidence was to the effect that the car struck the pipe, causing its fall. Another car had just passed without striking the pipe. It appeared that when this car approached the excavation the driver stopped it, the conductor looked along the track and thought there was room to pass, and the foreman of the contractor who was making the excavation, signalled to the driver to come on; he drove along at a walk, passed two of the sections of pipe and struck the third. *Held*, that the evidence failed to establish negligence on defendant's part, and that the submission of the question to the jury was error. *Schmidt v. S. & H. P. R. R. Co.* 556

11. Plaintiff was employed as a brakeman upon one of defendant's freight trains. One of its printed rules required brakemen, before starting, to test the hand brakes, "and see that they are in proper condition and work easily." This was not done by plaintiff or any of the brakemen upon the train in question. The train stopped for about two hours at a station where the cars were usually inspected, but no inspection was made. The train stopped at another station, just beyond which was a steep down grade, but although plaintiff and his associates well knew of this grade and of the dangers incident to an attempt to take such a train down without the brakes being in good order, and also, that the brakes of heavily loaded moving cars were apt to get out of order, made no examination. Upon attempting to set the brakes, after the train started upon the down grade, it was discovered that a number of them would not work, and in consequence the speed of the train could not be checked, a greater portion of it was thrown from the track and plaintiff was injured. In an action to recover damages, it appeared that plaintiff knew of and had read the printed rules. *Held*, that as disobedience of the rules caused the accident, plaintiff was not entitled to recover. *LaCroy v. N. Y., I. E. & W. R. F. Co.* 570

12. *It seems* that had plaintiff been unacquainted with the rules he would not be entitled to recover, as with full knowledge of the dangers, it was incumbent upon him and his associates to ascertain before reaching the down grade that a sufficient number of the brakes to properly check the train were in order. *Id.*

RECEIVER.

1. The executors and trustees appointed under and by the will of McC. were, in an action brought for that purpose, removed and a receiver appointed of the rents and profits of the real estate, "freehold and leasehold," and of the personal property, to whom the tenants

were directed to attorn, and who was authorized to lease the lands and tenements, etc., pay taxes, assessments and other lawful charges thereon. Subsequently the receiver was removed and defendant appointed receiver in his stead, with the same powers and duties. At the time of the death of McC. he was lessee of certain premises in New York city for a term of years, at an annual rental, payable semi-annually, on the first days of February and September to others. In summary proceedings brought in November, 1879, to remove defendant as tenant and F. as under-tenant for non-payment of rents, they appeared by attorney and by consent a judgment of dispossession was entered against them. In an action to recover rent accruing under the lease after the judgment above mentioned, defendant admitted that he paid to plaintiff the amount of the rent to September 1, 1878, and that in May, 1879, he leased them to F. *Held*, that from the admissions in the answer it was to be inferred that defendant went into possession at the time he qualified as receiver, and that he paid rent from that time up to the date specified; that it was immaterial as to whether defendant was appointed receiver of the real estate or simply of the rents and profits, as he was appointed receiver of the personality and the lease went to him as such (1 R. S. 722, § 5; 2 R. S. 82, § 6), and, therefore, that he was liable for the rent accruing up to September 1, 1879. *Wells v. Higgins.* 459

2. By the lease, McC. covenanted to pay the Croton water rent and all taxes and assessments on the demised premises. Upon the trial, plaintiff introduced in evidence tax bills, including water rents for the years 1876, 1877, 1878 and 1879; these were objected to as immaterial. Defendant's counsel asked the court to direct the jury to limit the verdict to the taxes for 1879; this was denied and said counsel excepted. The court directed a verdict for all the taxes to which said counsel excepted generally. *Held*, that the exceptions were too broad to present the question as to defendant's liability for taxes

which accrued prior to his appointment as receiver; and that the objection and motion as made were properly overruled. *Id.*

REDEMPTION.

The right of a subsequent lienor to redeem from a mortgage is derived from the owner of the mortgaged premises, and he is in this respect in no better position than the owner; if, therefore, he wishes to stop interest or compel an assignment of the prior lien, any tender he may make must be as absolute and specific as one made by the owner with like intent. *Nelson v. Loder.* 288

REFERENCE.

Where, upon the trial of an action before a referee, motions by defendant for a dismissal of the complaint were made before the taking of any evidence and after plaintiff rested, which were not passed upon by the referee, he reserving his decision, and thereafter evidence was introduced by defendant, and the case submitted to the referee without a renewal of the motions or calling for a decision thereon, and subsequently the referee made his report, dismissing the complaint without any findings of fact, or requests to make any such findings, *held*, that the judgment was not reviewable here, because of the absence of findings required by the Code of Civil Procedure (§ 1022). *Gilman v. Prentice.* 488

REFORMATION OF CONTRACT.

1. In an action, commenced in 1887, to recover an alleged balance unpaid of the purchase-price of a farm sold and conveyed in 1880, by plaintiff, to defendant, defendant set up as a counter-claim, and the referee found in substance that the sale was by the acre, that plaintiff represented that there were 230 acres in the farm, and relying thereon he agreed to pay for that number, that shortly before the commencement of the action he discovered that there were only

about 211 acres. The referee found that the agreement was the result of a mutual mistake. Defendant demanded a reformation of the contract and an allowance for the deficiency. *Held*, that defendant was entitled to the relief sought. *Gallup v. Bernd.* 370

2. Also *held*, that the correction of the mistake sought for could be made as well upon answer, as in a suit brought directly for that purpose. *Id.*

REMEDY.

1. Where the owner of lands in a city has laid it out into lots, which are sold to different purchasers, each conveyance containing covenants on the part of the grantee running with the land restricting the use thereof to the purposes of a private residence, or prohibiting the erection thereon of certain specified structures, while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee or his successors in title of the privilege of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed. *Amerman v. Deane.* 355

2. One B. owned a block of land in the city of New York, which he divided into lots for private residences and conveyed to different parties by deeds, each of which contained a covenant on the part of the grantee, his heirs and assigns, not at any time thereafter to erect, suffer or permit upon the premises conveyed any tenement-house, which covenant it was agreed should run with the land. In an action against one, who through various mesne conveyances, all of which contained said restriction, had become the owner of a lot in said block, brought by the owner of another lot, used as a private residence, to restrain a violation of the covenant, it was

proved that the entire surrounding neighborhood had been mostly built up with flats or tenement-houses; that the tenement-house defendant was building was a large one, and he had expended large sums thereon. The trial court refused a permanent injunction, but fixed the permanent damages, *i. e.*, the difference in value of plaintiff's premises with and without defendant's tenement building, and awarded an injunction restraining the defendant from renting her building to any tenant until such damages and the costs were paid. *Held*, no error; that the court in awarding damages was not confined to those sustained before the commencement of the action. *Id.*

3. But *held*, that the trial court might properly and should have required plaintiff, upon receipt of the damages awarded, to execute to defendant a release of the covenant. *Id.*

4. The provisions of the Code of Civil Procedure (§§ 445, 1005, 1216, 1292, 1323, 2142, 2263, 3058), providing for restitution, on reversal of a judgment or order, of money or property, or its proceeds, of which the appellant has been deprived by reason of the erroneous judgment or order, were enacted in recognition of the common-law right of restitution, and to furnish additional means of enforcing that right. *Haebler v. Myers.* 363

5. The remedies prescribed, therefore, are not exclusive, and a party entitled to restitution may obtain relief by action. *Id.*

RESTITUTION.

1. The provisions of the Code of Civil Procedure (§§ 445, 1005, 1216, 1292, 2142, 2263, 3058), providing for restitution, on reversal of a judgment or order, of money or property, or its proceeds, of which the appellant has been deprived by reason of the erroneous judgment or order, were enacted in recognition of the common-law right of restitution, and to furnish additional means of enforcing that right. *Haebler v. Myers.* 363

2. The remedies prescribed, therefore, are not exclusive, and a party entitled to restitution may obtain relief by action. *Id.*

RIPARIAN OWNER.

1. The title of a riparian proprietor to his water rights in a stream, and his right to redress for their invasion, is not conditional upon a beneficial user of them. *N. Y. Rubber Co. v. Rothery.* 298

2. Where there is a diversion of the waters of the stream, which materially diminishes its natural flow over the lands of a proprietor below, he may maintain an action and is entitled to recover nominal damages, although he has as yet made no use of the waters, or water enough is left in the stream for the purposes of his business as then conducted. *Id.*

3. This right to recover nominal damages is substantial, as it confirms the proprietor's right to the beneficial use of the waters of the stream as it was accustomed to flow before the diversion, and if withheld might tend to impeach or destroy his title by adverse user. *Id.*

SALES.

In an action to recover the alleged purchase-price of certain goods, plaintiff's evidence was to the effect that his stock of goods, which was insured in four companies, having been damaged by fire, appraisers were appointed, one by plaintiff, and one, the defendant, by the companies; that, in order to facilitate the adjustment, defendant agreed to and did purchase, for himself, a portion of the damaged goods, in respect to which the appraisers could not agree, at cost price, he agreeing to pay the purchase-price to the companies in proportion to the amount of their respective policies, the amount to be included in the award as if the goods sold were a total loss. In respect to one of the companies, the financial condition of which was doubtful, defendant agreed that if it became

insolvent within sixty days, so as not to pay its policy, he would pay its proportion to plaintiff. *Held*, that the agreement was not one to answer for the debt or default of another, but an agreement to pay the purchase-price of goods sold to himself, either to the company or to plaintiff; the contingency not affecting defendant's liability, which was absolute, but only the method of discharging it; and so that the contract was not within the Statute of Frauds; also, that the contract was not void as against public policy. *Goodman v. Cohen.* 205

See VENDOR AND PURCHASER.

SERVICES.

1. When, through the procurement of a broker employed to effect an exchange of real estate, a contract for the exchange has been agreed upon and entered into between his customer and the person with whom the exchange was to be effected, in the absence of any express agreement to the contrary, the broker is entitled to his commission. *Kalley v. Baker.* 1

2. In an action to recover for services, alleged to have been performed by plaintiff, as broker in procuring for defendant, at his request, a lease of property belonging to the city of New York, the power to lease which was in the board of commissioners of the sinking fund, the lease to be for the highest rental bid at public auction or by sealed bids after public advertisement (§ 170, chap. 410, Laws of 1882), plaintiff's evidence was to this effect: Notices were posted upon the premises that they were to be rented, and reference was made therein to the comptroller for information, his purpose being in accordance with custom to procure a satisfactory offer before advertising. Plaintiff having obtained from the comptroller a proposed rental and a diagram, told defendant that he had the property to rent; they went together to see the comptroller, and defendant made an offer, which was accepted by that

officer; defendant signed a memorandum which contained a provision that he "should pay all brokerage." Plaintiff was not employed or invited by the comptroller to procure offers. The amount of plaintiff's commission was stated by him; this defendant agreed to pay if he obtained the lease at his bid, which he did. *Held*, that the evidence justified a finding of a consideration sufficient to support defendant's promise; and so, that a motion for a nonsuit was properly denied. *Myers v. Dean.* 65

3. Defendant's evidence was to the effect that plaintiff was not employed by and performed no services for him, and that his agency was in no sense a procuring cause in obtaining the lease. The court charged that if defendant stated to plaintiff before the lease was obtained that if he obtained the lease on his offer he would pay the commission, plaintiff was entitled to recover. *Held*, error; as without some employment of, or the performance of, some service by plaintiff, there was no consideration for defendant's promise; and that the question of employment or service was for the jury. *Id.*

SHERIFF.

See EXECUTION.

SHIPPING.

See STEAMSHIP COMPANIES.

SPECIFIC PERFORMANCE.

1. The will of F., after legacies to the testator's children and a gift to his wife "forever" of the residuary personalty, also a provision that in case the personalty was insufficient to pay said legacies enough real estate should be sold for that purpose, contained this clause: "I also give, devise and bequeath to my wife Ellesheba all the rest and residue of my real estate, but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively,

to be divided in equal shares between them.' In an action for the specific performance of a contract for the purchase of land which formed part of the residuary real estate, title to which plaintiff claimed through the widow, *held*, that she took only a life estate; but that by necessary implication a beneficial power was conferred upon her to dispose of the residuary real estate, with a limitation over in case of her death without exercising the power; and that, therefore, she could convey a good title. *Leggett v. Firth*. 7

2. The parties entered into a contract by which plaintiff agreed to sell and defendant to purchase a certain lot in the city of New York; the latter refused to perform the contract because of the filing of a *lis pendens* a few days before the making of the contract, in an action to have certain deeds and other instruments affecting the title to the block of which the lot formed a part, declared void. Neither the plaintiff here nor her grantor were made parties to that action. The complaint therein alleged that P., the former owner of the block, when he, by reason of extreme old age, was "mentally weak, incompetent and unsound of mind, incapable of attending to business personally, and incapable and incompetent to understand and comprehend properly the nature of a business transaction," and when entirely under the control of S., his agent, through force and fraud practiced upon him by S., who was bribed thereto by the defendant, acting in pursuance of a fraudulent scheme and conspiracy entered into between them to obtain title to the property, caused and influenced P. to make a contract agreeing to convey the property in question to E., one of the defendants, in exchange for other real estate, and subsequently procured P. to execute such a conveyance, which contract and conveyance was in fraud of the rights of plaintiff in that action as heir at law and legatee of P. *Held*, that the averments of the complaint were not sufficient to justify a finding that P. was insane when he executed the contract and deed,

but that the gravamen of the action was fraud; that as it was conceded that plaintiff here took title to the lot in question in good faith, paying a full consideration, his title was not affected by the fraud (2 R. S. 137, § 5), and that plaintiff was entitled to a judgment for specific performance. *Aldrich v. Bailey*. 15

3. V. died seized of certain premises, leaving his widow and three children, all of age, surviving him. By his will he gave to his widow all of his estate during life, or until she should remarry. Should she remarry, the executors were directed to sell all of the estate, pay one-third of the proceeds to her and divide the residue equally among the children, the children of any child who may have died to receive the parent's share. Upon the death of the wife without having remarried, the property was directed to be divided equally among the testator's children, the children of a deceased child to receive their parent's share. Full power was given to the executors to sell and convey the real estate "whenever they may deem it best to do so, and upon such terms as they may think desirable." The widow and children united in a conveyance of the premises to defendant, who contracted to sell the same to plaintiff. Defendant tendered a deed, executed by himself, which plaintiff refused to accept. In an action for specific performance, or, in case it could not be had, to recover back the purchase-money paid, defendant produced a deed, executed by the executors, which recited that the consideration stated was the same as that stated in the deed of the widow and children. It was not claimed that any portion of the consideration was paid to the executors as such. *Held*, that the first deed simply conveyed a title, subject to be defeated in part by the death of one of the children prior to the death or remarriage of the widow; that nothing remained for the executors to convey but the future contingent interests of the grandchildren, and this, under the power of sale, they could only so sell and convey as to secure the proceeds to the grandchildren in case of the contingency

happening making them the ultimate devisees; that the deed executed by them was not a valid execution of the power; and, therefore, that defendant did not have a marketable title. *Harris v. Strodl.*

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STATE.

1. Upon a claim presented by P. against the state, the Court of Claims found that for many years P. was the owner and in possession of a dry-dock connected with a large basin upon the land of the state, opening into the Erie canal; across the mouth of the basin was maintained a bridge which was a part of the tow-path. The basin was filled with water from the canal and the surplus water of the canal flowed through P.'s land. The only means of communication between the dry-dock and the canal was through the basin. The bridge was a swing bridge which had been erected by the claimant, with the consent of the state. In the spring of 1886, before the opening of navigation and when there was no water in the canal, the state removed the bridge, erected in its place a stationary bridge at the same level as the tow-path, offering to allow claimant to erect a new elevated bridge, which offer it did not appear he accepted. By reason of the change, P. was unable to move two boats which he had at that time, one in the basin and the other in the dry-dock. The court found that there was no liability on the part of the state. *Held*, error; that while the privilege enjoyed by P. was revocable at the will of the state, it included an obligation which the state could not withdraw from arbitrarily, when this would inflict severe loss upon P.; that the erection of the bridge by him and his allowance of the discharge of the surplus waters across his land constituted presumably in some measure the consideration for the privilege, and having permitted him to place his boats inside the bridge and thereafter withdraw the water, the state was bound to afford him a reasonable opportunity to remove them; and that this obligation was not met by the offer

to allow him to erect a new bridge. *Putnam v. State of New York.* 344

2. To make a legal and permanent appropriation by the State, of land or water for the use of a canal, the quantity must be definitely ascertained and described, so that the owner may know how much has been taken and what he is entitled to be compensated for. *Hayden v. State of New York.* 533

3. In 1867 the canal board passed a resolution, by its terms approving a map for the permanent appropriation "of the Port Byron water power on the Owasco outlet for the feeder to the Erie canal," and declaring that "the water and lands necessary for said feeder are hereby permanently appropriated." The owners of the water power filed their claim for damages, and, in 1870, while it was pending, the canal board passed a resolution defining the quantity of water intended to be taken by the former resolution, by which it was fixed at a certain number of cubic feet per minute, not the whole stream. In 1871, an award was made to the owners, which was paid. In 1879, the state appropriated all the water in the race-way. Upon a claim of damages for this appropriation, *held*, that the resolution of 1867 was too indefinite to effect a legal appropriation, and was void; that the state officers, therefore, had power by subsequent action to make an appropriation of a limited quantity of water; and that the payment for this limited appropriation did not defeat the claim for the residue when it was taken.

Id.

4. In 1869, before trial of the first claim, the canal appraisers made a report to the legislature to the effect that the appropriation was of the entire water power. *Held*, that as the claimant was not a party to it, the report was not binding upon him. *Id.*

STATUTES.

— § 170, *chap. 410, Laws of 1882.*

See Myers v. Dean, 65.

— 2 R. S. 187, § 5.

See Aldrich v. Bailey, 85.

— § 19, *chap. 153, Laws of 1801.*
 — § 15, *chap. 185, Laws of 1826.*
 — 44, *tit. 3, chap. 298, Laws of 1888.*
See Coonley v. City of Albany, 145.
 — § 7, *chap. 282, Laws of 1854.*
 — *Chap. 598, Laws of 1858.*
See Kane v. N. Y., N. H. & H. R. Co., 160.
 — *Chap. 228, Laws of 1877.*
See In re Trustees Importers & Grocers' Exchange, 212.
 — 1 R. S. 501, 526, §§ 100-103.
 — *Chap. 245, Laws of 1878.*
 — *Chap. 575, Col. Laws of 1782.*
 — *Chap. 686, Col. Laws of 1789.*
 — *Chap. 14, Laws of 1789.*
 — *Chap. 56, Laws of 1880.*
 — *Chap. 514, Laws of 1864.*
 — *Chap. 6, Laws of 1865.*
See James v. Sammis, 289.
 — §§ 10, 18, *chap. 611, Laws of 1875.*
See Chemical N. Bank v. Colwell, 250.
 — 2 R. S. 134, § 6.
 — 1 R. S. 728, § 51.
See Bork v. Martin, 280.
 — 1 R. S. 727, § 47.
 — 1 R. S. 728, §§ 49, 55.
 — 1 R. S. 729, § 58.
 — *Chap. 115, Laws of 1845.*
 — *Chap. 261, Laws of 1874.*
 — *Chap. 184, Laws of 1876.*
See Wainwright v. Low, 313.
 — § 15, *chap. 656, Laws of 1886.*
 — § 6, *tit. 6, chap. 461, Laws of 1871.*
See Collins v. Long Island City, 321.
 — *Chap. 341, Laws of 1876.*
 — *Chap. 321, Laws of 1877.*
 — *Chap. 175, Laws of 1888.*
See Ronald v. Mut. Reserve Fund Life Assn., 378.
 — *Chap. 646, Laws of 1873.*
See Dudley v. Parker, 386.
 — § 2, *chap. 466, Laws of 1877.*
 — *Chap. 294, Laws of 1886.*
See Dutchess Co. M. Ins. Co. v. Van Wagoner, 398.
 — *Chap. 306, Laws of 1849.*
 — *Chap. 108, Laws of 1851.*
See Aldinger v. Pugh, 403.
 — § 28, *chap. 140, Laws of 1850.*
See P. J., M. & N. Y. R. R. Co. v. N. Y., L. E. & W. R. R. Co., 439.
 — 1 R. S. 728, § 55.
See Lahey v. Kortright, 450.
 — 1 R. S. 732, § 5.
 — 2 R. S. 82, § 6.
See Wells v. Higgins, 459.
 — 1 R. S. 663, §§ 16, 17.
See Luetsford v. Lord, 465.

— *Chap. 150, Laws of 1845.*
See Seneca Nation v. Hugaboom, 492.

See CIVIL DAMAGE ACT.
 LIMITATION OF ACTIONS.
 STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

1. In an action to recover the alleged purchase-price of certain goods, plaintiff's evidence was to the effect that his stock of goods, which was insured in four companies, having been damaged by fire, appraisers were appointed, one by plaintiff, and one, the defendant, by the companies; that in order to facilitate the adjustment, defendant agreed to and did purchase, for himself, a portion of the damaged goods, in respect to which the appraisers could not agree, at cost price, he agreeing to pay the purchase-price to the companies in proportion to the amount of their respective policies, the amount to be included in the award as if the goods sold were a total loss. In respect to one of the companies, the financial condition of which was doubtful, defendant agreed that if it became insolvent within sixty days, so as not to pay its policy, he would pay its proportion to plaintiff. *Held*, that the agreement was not one to answer for the debt or default of another, but an agreement to pay the purchase-price of goods sold to himself, either to the company or to plaintiff; the contingency not affecting defendant's liability, which was absolute, but only the method of discharging it; and so that the contract was not within the Statute of Frauds. *Goodman v. Cohen.* 205
2. Where land has been conveyed to a party upon an oral trust, invalid under the Statutes of Frauds and of Uses and Trusts (2 R. S. 134, § 6; 1 id. 728, § 51), it is lawful for him to perform it, and if he conveys the land and receives the proceeds, the law will treat him as a trustee of personal property realized for the benefit of the *cestui que trust*, who may maintain an action against him to recover such proceeds. *Bork v. Martin.* 280

8. The courts will not allow the Statute of Frauds to be used as an instrument of fraud. *Id.*
4. *It seems* that, under the provision of the General Railroad Act (§ 28, chap. 140, Laws of 1850), authorizing a corporation organized under it "to intersect, join and unite its railway with any other railway," upon the grounds of the company owning the road so intersected and requiring the latter company "to grant the facilities" needed for the purpose, the right so provided for is an interest in lands and can only be created by a written instrument; a verbal agreement attempting to create it is void, under the Statute of Frauds. *Pt. J., M. & N. Y. R. R. Co. v. N. Y., L. E. & W. R. R. Co.* 439

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STEAMSHIP COMPANIES.

1. By the statute of Great Britain, known as the "Passengers' Act 1855," every passenger ship is required to carry a duly qualified medical practitioner, and its owner or charterer is required to provide for the use of its passengers a supply of proper and necessary medicines for their medical treatment during the voyage, properly packed and placed under the charge of a medical practitioner, "to be used at his discretion." In an action to recover damages against a corporation of Great Britain for injuries alleged to have been sustained by plaintiff, a passenger on one of its steamers, alleged to have resulted from taking calomel furnished by the steamer's physician in response to a request for "quinine," it appeared that defendant issued a prospectus to advertise its line, which contained a statement that an experienced surgeon was carried on board each ship, and that all medicines were supplied gratis. *Held*, that defendant assumed no duty or liability beyond those imposed by the statute, *i. e.*, to employ a duly qualified physician to, provide a supply of suitable and necessary medicines, properly packed and labeled, and to provide a proper place in which to keep them; and that, having complied with these requirements, for errors and mistakes on the part of the physician thereafter it was not responsible. *Allan v. State S. S. Co.* 91
2. It appeared that in the outset of the voyage the medicines were inspected, as required by the statute, by the medical examiner at the port from whence the steamer sailed, and they were then properly packed and labeled. Plaintiff produced evidence to the effect that on the evening when she applied for the medicine the "surgery" where the medicines were kept was in disorder and confusion, the bottles being out of place, and the trial court left it to the jury to determine whether the condition of the "surgery" was such as to show want of ordinary care on the part of defendant in providing and properly labeling medicines, or left them open so that a mistake was liable to occur. *Held*, error; that the evidence of confusion and disorder after the steamer went to sea and after the medicines were put in charge of the physician, did not justify a finding of negligence on the part of defendant. *Id.*
3. Plaintiff was a gangwayman in the employ of one L., a stevedore, engaged in unloading a vessel belonging to defendant. Under his agreement with defendant, L. was to be paid a stipulated price per ton for unloading, defendant to furnish the steam power and a man to run the winch. Plaintiff gave the signals to the winchman. Plaintiff, to hoist a load, gave the signal to go ahead, which was done by the rope winding around the drum of the winch. In hoisting the load in question, the rope ran off the drum. The winchman stopped and called plaintiff's attention to this. The latter supported the hoist by means of a hook, and then seized the rope to lift it on to the drum, ordering the winchman to back so as to loosen the rope. Instead of doing so, the

winchman went ahead, and plaintiff's hand was drawn against the drum and he was injured. In an action to recover damages, it did not appear that L. had power to order or control the winchman, further than to signal to him through the gangwayman. *Held*, that the winchman could not be regarded as the servant of L.; that the fact that he received orders when to hoist or lower from plaintiff did not change his relations to defendant as its servant, and that as his negligence caused the injury, defendant was liable. *Johnson v. Netherlands A. S. N. Co.* 576

STREETS.

See HIGHWAYS.

SURROGATES.

1. The provision of the act authorizing the election of special county judges and surrogates in certain counties (Chap. 306, Laws of 1849, as amended by chap. 108, Laws of 1851), which provides that a special surrogate so elected "shall possess all the powers and perform all the duties which are possessed and can be performed by a county judge out of court," was not repealed by the Code of Civil Procedure. *Aldinger v. Pugh.* 408
2. Accordingly *held*, that a special surrogate, elected for the county of Oneida, had power to grant an injunction in a case where the county judge would have had jurisdiction (Code Civ. Pro. 606), and that one violating an order so granted was properly adjudged in contempt. *Id.*

TENDER.

1. Where the whole amount secured by a mortgage on real estate is due, a tender of the same by the owner of the mortgaged premises extinguishes the lien of the mortgage, although the tender is not kept good; but it does not discharge the promise or covenant to pay the debt, and for this the debtor remains liable. *Nelson v. Loder.* 288

2. If the debtor wishes to extinguish his liability for subsequently accruing interest, or to demand some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time; and so, must keep the tender good. *Id.*

TITLE.

1. The will of F., after legacies to the testator's children and a gift to his wife "forever" of the residuary personalty, also a provision that in case the personalty was insufficient to pay said legacies enough real estate should be sold for that purpose, contained this clause: "I also give, devise and bequeath to my wife Ellesheba all the rest and residue of my real estate, but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively, to be divided in equal shares between them." In an action for the specific performance of a contract for the purchase of land which formed part of the residuary real estate, title to which plaintiff claimed through the widow, *held*, that she took only a life estate; but that by necessary implication a beneficial power was conferred upon her to dispose of the residuary real estate, with a limitation over in case of her death without exercising the power; and that, therefore, she could convey a good title. *Leggett v. Firth.* 7
2. In an action to recover back moneys paid upon a contract to sell real estate the following facts appeared: In 1876, one H. died seized of the premises in question. At that time he was living with one B. as his wife. R., to whom B. had been married, was then alive, but had obtained a divorce from her, the decree in which forbade her remarriage during his lifetime. B. had one daughter W., of whom R. was the father, and another daughter C., of whom H. was the father; the latter left no heirs at law. H. devised one-third of his real estate to his "adopted daughter" W., one-third to his "daughter" C., and one-third to

his "wife" B., adding "that is to say, her dower right to my estate;" he conferred upon his "wife" B., with his executor, power to sell his real estate, and provided that the proceeds should be deposited by them in a savings bank until his "above-named children" arrived at the age of twenty-one, when they were to receive their interest of one-third of the money deposited therein. H. then devised to his "wife" the rents and interests of his estate during the minority of his "children." B. died intestate a few months after H. C. died within a year thereafter, aged two years, leaving no relatives on her mother's side except a grandmother and her half sister W. Subsequently, in a proceeding for the sale of infant's real estate, the interest of W. was sold to defendant. *Held*, that under the will, B. was vested with the fee of one-third of the real estate; that upon her death, C. and W. each became vested with an undivided one-half; that upon the death of C., her undivided one-half passed to W.; and so, that defendant had a good title. *Schult v. Moll.* 122

8. V. died seized of certain premises, leaving his widow and three children, all of age, surviving him. By his will he gave to his widow all of his estate during life, or until she should remarry. Should she remarry, the executors were directed to sell all of the estate, pay one-third of the proceeds to her and divide the residue equally among the children, the children of any child, who may have died to receive the parent's share. Upon the death of the wife without having remarried, the property was directed to be divided equally among the testator's children, the children of a deceased child to receive their parent's share. Full power was given to the executors to sell and convey the real estate "whenever they may deem it best to do so, and upon such terms as they may think desirable." The widow and children united in a conveyance of the premises to defendant, who contracted to sell the same to plaintiff. Defendant tendered a deed, executed by himself, which plaintiff refused to ac-

cept. In an action for specific performance, or, in case it could not be had, to recover back the purchase-money paid, defendant produced a deed, executed by the executors, which recited that the consideration stated was the same as that stated in the deed of the widow and children. It was not claimed that any portion of the consideration was paid to the executors as such. *Held*, that the first deed simply conveyed a title, subject to be defeated in part by the death of one of the children prior to the death or remarriage of the widow; that nothing remained for the executors to convey but the future contingent interests of the grandchildren, and this, under the power of sale, they could only so sell and convey as to secure the proceeds to the grandchildren in case of the contingency happening making them the ultimate devisees; that the deed executed by them was not a valid execution of the power; and, therefore, that defendant did not have a marketable title. *Harris v. Strodl.* 392

4. In an action of ejectment plaintiff claimed title under a judgment rendered in 1848 in a partition suit, by which certain meadow land bounded on the Atlantic ocean, including the land in question, which was land on the ocean beach, was set off to J., one of the parties, also a deed to him from the other parties to that action. There was no evidence that the land in question had been occupied by J. or his successors in title for any purpose, or that he was ever in possession of or exercised any acts of ownership over the land set off to him, except by assuming to convey it. *Held*, that the evidence failed to establish title in plaintiff. *Greenleaf v. B., F. & C. I. R. Co.* 408

5. The will of K., after providing for the payment of debts, etc., directed that his residuary estate should be divided equally between his wife and children. The executors were directed to divide such residue into as many equal shares as would give two to each beneficiary, to convey one to the benefi-

clary and retain the other, paying to him or her the income during life; they were also authorized to sell any or all the real or personal estate, and after payment of debts as provided, to invest the proceeds "as they, in their discretion, may deem most for the interest of the parties interested." The executors named in the will renounced and letters of administration with the will annexed were issued to others. By judgment, in an action of partition and for the appointment of a trustee in place of those who had renounced, C. was appointed such trustee and certain lots in the city of New York were set off to him, as trustee, for the testator's two sons, L. and G., who, with the widow, were the only beneficiaries. Subsequently, upon petition of C., in which the beneficiaries joined, he was permitted to surrender the trusts, and L. was appointed trustee of the share of G., while the latter was appointed trustee of the shares of L. and the widow, and conveyance was made to them by C. L. and C. contracted to sell the lots in question to plaintiff. In an action to recover back the portion of the purchase-price paid, and expenses, upon the ground of defect of title, *held*, that the will created an express trust (1 R. S. 728, § 55), and the trustees took title to the lands embraced therein and set apart for its purposes; that L. and G. succeeded to this title; that the power of sale was intended to be applicable to the subject of the trust, and, being thus annexed to it in aid of its execution, was taken by the substituted trustees; and that, therefore, they could convey a good title. *Lahey v. Kortright*.

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6. Also *held*, that as in the action of partition all the parties interested were before the court, none of them could challenge the title of the trustees to the real estate, which was by the judgment therein made subject to the trust.

Id.

TOWNS.

1. Plaintiff, while riding upon a load of hay along one of defendant's highways, was injured by

being swept from the load by the limbs of a tree, which overhung the traveled track. On trial of an action to recover damages on the ground of alleged negligence of defendant's commissioners of highways, the court charged as follows: "Notice must be proven of the existence of the obstruction a sufficient length of time, from which a jury may say a commissioner ought to have known it. Now it is nothing of any consequence that thousands have passed there without injury. If this obstruction existed so long that a vigilant officer should have known of its existence, they are liable." In accordance with requests of defendant's counsel, the court then charged in substance that the jury had a right to take into consideration, in determining whether the commissioners were chargeable with notice, the fact that people driving on loads of hay had passed under this tree without difficulty; also the fact that no complaint had been made to the commissioners. Said counsel then excepted to the sentence in the charge that "it is nothing of any consequence that thousands passed there without injury." *Held*, untenable. *Embler v. Town of Wallkill*.

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2. It appeared that, before the time of the accident, a city was incorporated which embraced territory belonging to the town, and that the commissioners of highways, for whose negligence the town was sought to be made liable, were elected before the incorporation by electors of the town, including those who resided within the present limits of the city. Defendant claimed that the city was jointly liable, and should have been made a party. *Held*, untenable. *Id.*

TRESPASS.

In an action for alleged trespass in entering upon plaintiff's land in the town of Huntington, and taking down his fence, the defense was that the *locus in quo* was part of a public highway which bounded plaintiff's premises on the south, upon which the fence encroached and that it was removed

by order of the highway commissioners. It appeared that in 1869, the fence on the south side of the highway which had been located there for over forty years was moved south, which constituted the alleged encroachment claimed by the defendants. With a view to proceedings for removal of the fence under the provisions of the Revised Statutes (1 R. S. 501-526, §§ 100-103, as amended by chap. 245, Laws of 1878), which declares that all roads not recorded which have been used as public highways for twenty years, shall be considered such, and authorizes proceedings for removal of encroachments, the commissioners of highways of the town in 1885, made an order purporting to define and describe the highway, which with a map thereof, was made of record in the town. In 1886, the commissioners made an order describing the alleged encroachment, and directing the removal of the fence. This order with a notice annexed was served upon plaintiff, and after sixty days, under direction of the commissioners, the fence was removed by defendants. It was claimed by plaintiffs that said statutory provisions were not effectual to support the proceedings, because prior to 1864, they had no application to the town, it being governed by special acts (Chap. 14, Laws of 1789; chap. 56, Laws of 1830). These acts were repealed by the act of 1864 (Chap. 514, Laws of 1864), and by the act of 1865 (Chap. 6, Laws of 1865) the general statutes were extended to the counties named in said special acts. *Held*, that as at the time of the encroachment and of said order the road had been used as a public highway for twenty years, it was within and subject to said provisions of the Revised Statutes; that the amendment in 1878, in reference to the removal of encroachments, merely gave an additional remedy, which was available although it did not exist at the time of encroachment. *James v. Sanmis*. 289

TRIAL.

1. In an action by a father to recover damages for injuries to an infant

child, caused by defendant's negligence, it appeared that the father, who had had experience as a nurse himself, in that capacity took the entire charge of the child; after proving the value of his services as such, he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse. *Held*, error; that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto what he might have made had he not abandoned the business engagement. *Barnes v. Keene*. 13

2. In an action to recover damages for the alleged unlawful taking and conversion of certain goods, it appeared that prior to the execution of an assignment for the benefit of creditors, the defendant, as sheriff, had, under two executions against the assignors, levied upon their goods, and a subsequent sale of part of them, after payment of the execution, left a surplus. Subsequent to the assignment and while the goods unsold remained in defendant's possession, other executions came into his hands under which he claimed the right to sell a sufficient quantity of the goods remaining to satisfy said executions; the assignee without admitting the defendant's claim, in order to obtain possession of the goods, made an arrangement with the sheriff in pursuance of which he paid to the latter under protest a sum sufficient, with the surplus in his hands, to make up the amount of the other executions, and defendant thereupon released his levy. *Freeman v. Grant*. 22
3. At the close of plaintiff's case, his counsel asked the court to allow the complaint to be amended so as to conform to the facts proved. This was objected to and refused. *Held*, no error; as the effect of the amendment would be to substitute

for the cause of action stated one for money had and received, and so to allow a recovery upon an entirely different cause of action, and this may not be done against an objection. *Id.*

4. After the court had decided to dismiss the complaint, plaintiff's counsel asked the court to be permitted to withdraw a juror, in order to make a motion at Special Term to amend the complaint, which was denied. *Held*, no error; that it was discretionary with the court and the manner of its exercise would not be reviewed in this court. *Id.*

5. In an action to recover damages for an injury to plaintiffs' barge and its cargo while lying at defendant's dock, wharfage at which had been leased by plaintiffs, the testimony of the latter was to the effect that they made the lease upon the representation of defendant that the place at the wharf so let was safe and had six feet of water at low tide; that at the wharf it was less than six feet and the ground under the barge sloped down outward from the docks, so that at low tide the side of the barge near the dock rested on the bottom, and by reason of the slope broke away from its fastenings and turned over, thus causing the loss complained of. The barge had been at the dock for ten days prior to the injury, and at low tide had rested on the bottom. The court instructed the jury that if they found that the bottom of the ship was defective or in unsafe condition, and this caused the loss, the further question was for them to determine whether defendant was guilty of negligence and plaintiffs free from contributory negligence. Plaintiffs' counsel requested the court to charge "that if defendant made the statement that this place was all right, the plaintiffs had the right to rely on that statement." The court stated that the jury might consider that on the question of negligence, and declined to charge that the jury might rely on the statement, or that it relieved them from making a personal examination. *Held*, no error; that while assuming the

statement was made, plaintiffs were justified in assuming it to be true, and negligence could not be imputed to them in placing the barge there without personal examination, the inference was justified that when previously at low tide the barge rested on the bottom, it could have been easily ascertained whether the ground beneath it was suitable to rest upon, and the question of contributory negligence was properly submitted to the jury. *Vroman v. Rogers*. 167

6. In an action for libel, based upon an article in a newspaper published by defendant, accusing the plaintiff, a married woman, of unchastity, plaintiff's evidence showed the article to be false. Defendant gave evidence tending to prove the absence of actual malice on its part. The court was requested by defendant to charge that if the jury found it was not actuated by actual malice against plaintiff, they cannot award any damages for injured feelings or mental or bodily suffering; this was refused. *Held*, no error. *Warner v. Press Pub. Co.* 181

7. Plaintiff, who owned what was termed "a locator's mining claim" in government lands, contracted to convey the same to a company to be formed to develop the "lode" defendants, as part of the consideration, agreeing to pay a sum named. The claim was conveyed as agreed. In an action to recover a portion unpaid of the purchase-money, defendants set up as a counter-claim that plaintiff, to induce them to enter into the agreement, falsely and fraudulently represented that he was seized of the whole lode, when he had, in fact, previously conveyed his right to one-third of the surface ground of the lode to a niece, whereby they sustained damage. Plaintiff denied making any false representations, and testified that he informed defendants that he had given to his niece one-third of the surface. A deed to the niece was given in evidence. The court charged that it conveyed the right to the surface only, and did not impair plaintiff's right to the mate-

rial beneath. To this defendants excepted. The jury found for plaintiff on the issue of fraud. *Held*, that whether the deed conveyed one-third of the whole claim or a right only to one-third of the surface, if plaintiff represented that he owned the whole, the falsity of the representation was established; but that the jury having found with plaintiff on this issue, the construction of the deed was immaterial, so far as the counter-claim was concerned, and so, if erroneous, was not ground for reversal; that had the jury been instructed that the deed conveyed one-third of the mine instead of one-third of the surface only, this, conceding it to be correct, would not alone have warranted a finding of fraud, as while it would show a mistake on the part of plaintiff as to the construction, it would not establish any fraudulent intent. *McIntyre v. Buell*. 192

8. *It seems* that if defendants had sought in their counter-claim simply an abatement from the purchase-price, growing out of the failure of plaintiff to perform his contract, or if a rescission had been sought on the ground of mutual mistake, the charge, if erroneous, would have been material. *Id.*

9. Plaintiff, while riding upon a load of hay along one of defendant's highways, was injured by being swept from the load by the limbs of a tree, which overhung the traveled track. On trial of an action to recover damages on the ground of alleged negligence of defendant's commissioners of highways, the court charged as follows: "Notice must be proven of the existence of the obstruction a sufficient length of time, from which a jury may say a commissioner ought to have known it. Now it is nothing of any consequence that thousands have passed there without injury. If this obstruction existed so long that a vigilant officer should have known of its existence, they are liable." In accordance with requests of defendant's counsel, the court then charged in substance that the jury had a right to take into consideration, in determining whether the

commissioners were chargeable with notice, the fact that people driving on loads of hay had passed under this tree without difficulty; also the fact that no complaint had been made to the commissioners. Said counsel then excepted to the sentence in the charge that "it is nothing of any consequence that thousands passed there without injury." *Held*, untenable. *Embler v. Town of Wallkill*. 222

10. In an action to recover damages for the diversion of the waters of a stream, the court, after charging that if defendants diverted the waters to a degree that materially and appreciably diminished the flow of the stream, along the lands of plaintiff, the latter was entitled to nominal damages, charged in substance that the question must be determined by the use of the land as it was, and not with reference to the future; that the question was as to whether the water was diverted so as to leave the stream, to a material and appreciable extent, insufficient for the purposes of plaintiff's business, and refused to charge that plaintiff's right to maintain the action and to recover nominal damages did not depend at all upon his showing actual or perceptible damage. *Held*, error. *N. Y. Rubber Co. v. Rothery*. 293

11. Defendant insured plaintiff's canal boat for one year from August 2, 1886, against perils of "rivers, canals and fires," excepting losses "arising from want of ordinary care and skill in loading and stowing cargo, * * * inherent defects and other unseaworthiness," and from "gangways * * * being improperly secured and protected." The policy authorized the carrying of lime in barrels. In May, 1887, the boat was loaded with quick-lime in barrels at a point on the Hudson river. Between three and four hours after the loading was completed the hold of the boat was discovered to be on fire through the slacking of the lime; it was towed out into the river and sunk. This, it was conceded, was the only way to prevent total destruction of the boat by fire. In an action to re-

cover the insurance, plaintiff's evidence was to the effect that the lime was not wet while it was being transferred to the boat, and that the hatches were carefully closed; also, that the boat was thoroughly repaired late in the summer before the loss. The boat was tested after it was discovered to be on fire, and but one inch of water was found in the hold. There was no evidence as to the condition of the lime when it was delivered to the boat. No defects in the boat or any unseaworthiness were shown; defendant, however, claimed that these were to be inferred from the slacking of the lime, which, if the lime was dry when loaded, must have been caused by water entering through a leak in the boat. The plaintiffs were nonsuited. *Held*, error; that the evidence did not justify a finding that the slacking was caused by a leak of sufficient size to make the boat unseaworthy; that some of it may have been wet before loading sufficiently to have caused it to slack. *Singleton v. Phenix Ins. Co.* 298

12. It appeared that the day after the fire, defendant's agent, who issued the policy, was notified of the loss and examined the wreck; he received a verified statement of the circumstances of the loss, which, with a full statement of his own as to the condition, he mailed to defendant, by whom they were retained. Defendant's adjuster thereafter wrote to the agent that he had examined the boat and would "pick her up," *i. e.*, raise her. Plaintiffs verified formal proofs of loss and executed an assignment of all their interest in the boat to defendant, which was delivered to and retained by the agent. *Held*, that a finding by the trial court, as matter of law, that the boat had not been abandoned by the plaintiffs, and that an abandonment had not been accepted by defendant, was error. *Id.*

13. By a policy of life insurance issued by defendant, the answers of the appellant to defendant's medical examiner were warranted to be true. In answer to the ques-

tion "when last attended by a physician and cause?" the answer was "six years, measles." In an action upon the policy, for the purpose of proving the death, plaintiff produced in evidence a verified certificate, made about five months after the application, in which the attending physician stated that he had been the medical attendant or adviser of the decedent "for astralgia about one and a half years ago." *Held*, that the certificate could be availed of by defendant as evidence showing the falsity of the answer so made to the medical examiner; that the fact defendant would not have been permitted to introduce the statement in the certificate was not material; and, therefore, that a refusal of the court to charge, as requested by defendant, that this statement was to be taken into consideration by them was error. *Helwig v. Mut. L. Ins. Co.* 331

14. In an action of ejectment the following facts appeared: The premises in question belonged to one G., who died leaving a will, by which he devised and bequeathed his property to his widow for life, subject to an annuity to his brother J.; after her death he provided for the payment of certain bequests and directed that the remainder, if any, be equally divided between the children of J. G. and all the testator's relations by his father's side in the United States at the date of his will, subject to the payment of said annuity to J. The will then provided as follows: "He (J.) is to have nothing from my property, and I hereby cut off from inheriting anything or property of mine his wife, or any person in any way related to her, either by blood or marriage, with the exception of himself, and he only in the way I have stated above." After the death of the testator's widow this action was brought by the widow, the children and grandchildren of J. Plaintiffs gave evidence tending to show that J. G. died unmarried and without children, and that the testator had no relatives living in the United States at the date of his will or death who were descended from his grandfather or

father, other than plaintiffs. *Held*, that while the burden was upon plaintiffs of showing that there were no persons living who could take as remaindermen, it was sufficient to make out a *prima facie* case, and as their evidence showed the existence of any such person to be improbable, it was sufficient for that purpose, and that, therefore, a nonsuit was error. *Gullagher v. Crooks*. 338

15. In such an action it appeared that plaintiff's injuries were caused by the act of S. who, when intoxicated, drove a horse and buggy against a carriage in which plaintiff was riding, upsetting it. S. had invited one G. to ride with him that day, provided another person did not do so. On the evening before the accident, when passing defendants' liquor store together, G. invited S. to go in with him, which he did; S. remained near the door, while G. went on to the counter, had a bottle filled with whiskey, which he paid for, and both left together. It did not appear that they drank any of the whiskey that night, or that S. was informed by G. of his purpose to procure it. The next day G. went with S., taking the bottle of whiskey, from which they both drank. G. subsequently left the buggy and S. took in another person, with whom he was driving when the accident happened. *Held*, that the evidence failed to show that the sale of the liquor by the defendants was the proximate cause of the intoxication of S., but that the supply to him by G. of the liquor purchased by the latter was the proximate cause; and so, that defendants were not liable, and a denial of a motion for a nonsuit was error. *Dudley v. Parker*. 386

16. By a contract for regulating and grading one of defendant's streets at a price specified for the different kinds of work, after providing for substantial performance in accordance with the specifications, it was stipulated that defendant's commissioner of public works should determine what would constitute a performance; daily inspection, a right on defendant's

part to change the grade, and an examination by a surveyor after excavation, were also provided for, and when the completion of the work was duly certified by three of defendant's officers named, and also by its commissioner of public works, it agreed to pay therefor. In an action to recover for the work done at the contract prices, plaintiff produced in evidence the certificates required by the contract which showed the amount of work done, and certified to the completion of the contract and acceptance of the work. No fraud or invalidity in the contract was alleged by defendant, and that the work as certified was done was not questioned, but it claimed on the trial non-compliance with this provision of the contract: "The street is to be regulated two feet below the grade where there is rock, and is to be examined by the surveyor before placing any filling thereon. * * * Any portion of the street not thus regulated and properly examined will not be received as finished." This defense was not set up in the answer. Defendant was permitted to give evidence, under objection that it was not admissible under the pleadings, which tended to show that in places rock was left nearer than two feet to the established grade. The court directed a judgment for plaintiff for the amount as certified, with interest. *Held*, no error; that defendant was not entitled to give evidence, or to go to the jury on the question of non-compliance with said provision of the contract as it was not raised by the pleadings. *Brady v. Mayor, etc.* 415

17. Where a charge is correct in part, a general exception thereto without any qualification is not sustainable. *Wells v. Higgins*. 459

18. By a lease of premises in New York city the tenant covenanted to pay the Croton water rent and all taxes and assessments on the demised premises. Upon the trial of an action to recover rent, etc., plaintiff introduced in evidence tax bills, including water rents for the years 1876, 1877, 1878 and 1879; these were objected to as

immaterial. Defendant's counsel asked the court to direct the jury to limit the verdict to the taxes for 1879; this was denied and said counsel excepted. The court directed a verdict for all the taxes to which said counsel excepted generally. *Held*, that the exceptions were too broad to present the question as to defendant's liability for taxes which accrued prior to his appointment as receiver; and that the objection and motion as made were properly overruled. *Id.*

19. An omission of the averment in the complaint required by the provision of the Code of Civil Procedure (§ 549) authorizing the arrest of a defendant in an action for money received, that the money was received in a fiduciary capacity and forbidding a recovery unless the allegation is proved, may not be taken advantage of for the first time upon appeal; the question must be raised upon the trial. *Moffatt v. Fulton.* 507

— *A refusal of a trial court to charge in reference to a rule of law having no bearing upon the issue is not error.*

See Kane v. N. Y., N. H. & H. R. R. Co. 160

TRUSTS AND TRUSTEES.

1. Under the provision of the act of 1875 (§ 10, chap. 611, Laws of 1875), providing for the incorporation of certain business corporations, which requires that the directors of a corporation organized under it shall, at their election, "and throughout their term of office," be stockholders, whenever, and as soon as, a director parts with all beneficial interest in and control over his stock and causes the officers of the corporation to have knowledge of such fact, by request that a proper transfer be made on the corporate books, the statute operates to divest him of his office, and he ceases to be a director. (BRADLEY, J., dissenting.) *C. N. Bank v. Colwell.* 250
2. In an action against the alleged directors of such a corporation to recover a debt of the corporation because of failure to file an annual report in January, 1886, as required by the act (§ 18), it appeared that defendant C., in November 5, 1885, assigned and delivered his certificate of stock, which was for eighty shares, to J., the secretary of the company, for the purpose of terminating his connection with the company. J. accepted the assignment, C. asked for the transfer-book, but the company had no such book at that time, and he was told it was not necessary. A few days later, a transfer-book having been obtained, the assignment was entered therein. J., however, issued a new certificate to himself for only seventy-five shares, and to C., without his knowledge, a certificate for five shares, which J. induced him to accept, but not with any understanding that he should be a director. The debt in question was incurred by the corporation in June, 1886. *Held* (BRADLEY, J., dissenting), that C. ceased to be a stockholder on his assignment of stock, and thereupon ceased to be a director, and so, was not liable. *Id.*
3. Where land has been conveyed to a party upon an oral trust, invalid under the Statutes of Frauds and of Uses and Trusts (2 R. S. 184, § 6; 1 *id.* 728, § 51), it is lawful for him to perform it, and if he conveys the land and receives the proceeds, the law will treat him as a trustee of personal property realized for the benefit of the *cestui que trust*, who may maintain an action against him to recover such proceeds. *Bork v. Martin.* 280
4. H. held the title of certain lots in the city of B., as security for an indebtedness of J. At the request of J., and upon the agreement of plaintiff to pay the indebtedness, he conveyed the lots to defendant, who agreed to hold them for plaintiff's sole use and benefit, subject to his direction respecting sales thereof, and to pay over the proceeds of such sales. Plaintiff paid J.'s indebtedness and from time to time negotiated sales of lots, which defendant deeded at his request. Plaintiff having negotiated a sale

of the remaining lots, defendant refused to execute deeds to the purchasers unless the consideration was paid to his wife, which was done, plaintiff advancing the money in order to procure the deeds. *Held*, that plaintiff was entitled to recover of defendant the sum so paid; that while the statutes may have justified the defendant in refusing to dispose of the land, having done this he was no longer protected, but held the money under a parol trust which was valid; that plaintiff had the right to advance the money, and that the payment to the wife was not voluntary. *Id.*

5. Plaintiff's complaint alleged the conveyance of the premises to defendant upon a trust substantially as stated, the sale of the remaining lots, the receipt by defendant of the purchase-money, and his refusal to pay over the same, and then further alleged that defendant "has fraudulently and dishonestly appropriated the said moneys and converted them to his own use." *Held*, that this averment did not necessarily characterize the action as one of trover; and that it might be rejected. *Id.*

6. By an ante-nuptial agreement, S., in contemplation of the marriage, conveyed to a trustee certain lands, the trustee to pay to her the rents and profits, or at her election to permit her to hold and use the lands during her life, and upon her death to convey them as she, by deed, appointment or will, "should order, direct or appoint." S. retained possession of the premises until her death. *Held*, that the ante-nuptial conveyance did not create a trust within the meaning of the Statute of Uses and Trusts (1 R. S. 728, § 55), as the power of the trustee to receive and apply the rents and profits was dependent on the election of S., and she exercised the right reserved by her to herself take and hold the property; that no title vested in the person named as trustee (1 R. S. 727, § 47; *Id.* 728, § 49; *Id.* 729, § 58); and that, therefore, the premises were held and owned by S. at her decease. *Wainwright v. Low.* 318

7. The will of K., after providing for the payment of debts, etc., directed that his residuary estate should be divided equally between his wife and children. The executors were directed to divide such residue into as many equal shares as would give two to each beneficiary, to convey one to the beneficiary and retain the other, paying to him or her the income during life; they were also authorized to sell any or all the real or personal estate, and after payment of debts as provided, to invest the proceeds "as they, in their discretion, may deem most for the interest of the parties interested." The executors named in the will renounced, and letters of administration with the will annexed were issued to others. By judgment, in an action of partition and for the appointment of a trustee in place of those who had renounced, C. was appointed such trustee, and certain lots in the city of New York were set off to him, as trustee, for the testator's two sons, L. and G., who, with the widow, were the only beneficiaries. Subsequently, upon petition of C., in which the beneficiaries joined, he was permitted to surrender the trusts, and L. was appointed trustee of the share of G., while the latter was appointed trustee of the shares of L. and the widow, and conveyance was made to them by C. L. and C. contracted to sell the lots in question to plaintiff. In an action to recover back the portion of the purchase-price paid, and expenses, upon the ground of defect of title, *held*, that the will created an express trust (1 R. S. 738, § 55), and the trustees took title to the lands embraced therein and set apart for its purpose; that L. and G. succeeded to his title; that the power of sale was intended to be applicable to the subject of the trust, and, being thus annexed to it in aid of its execution, was taken by the substituted trustees; and that, therefore, they could convey a good title. *Lahey v. Kortright.* 450

8. Also *held*, that as in the action of partition all the parties interested were before the court, none of them could challenge the title of

the trustees to the real estate, which was by the judgment therein made subject to the trust.

Id.

VENDOR AND PURCHASER.

1. While at law the stipulated time of performance of a contract for the sale of land is of the essence of the contract, it is not essentially so in equity, and when the situation of the parties and the property remains unchanged, relief may be granted. *Schmidt v. Reed.* 108

2. Reasonable diligence in performance, however, is requisite to such relief where there is no acquiescence in the delay. *Id.*

3. When, by the terms of such a contract, the time for the performance is not of the essence thereof, it may be made so by reasonable notice by either party to the other, and the party giving the notice may then avail himself of the forfeiture on default. *Id.*

4. The parties hereto entered into a contract for the sale by defendants and the purchase by plaintiff of certain premises, by the terms of which plaintiff agreed to pay a specified portion of the purchase-price by taking the premises subject to a mortgage thereon for an amount specified, "having five years to run from November, 1886." The mortgage, in fact, matured in three years from that time. Three days before the time fixed in the contract for its performance plaintiff notified defendants of the mistake in the time of payment of the mortgage, of which fact, until such notice, they were ignorant, and also notified them that he would not accept a deed unless defendants procured at the time fixed for passing title a proper and sufficient extension of the mortgage, so as to conform to the contract. Defendants lived in New York; the owner of the mortgage in Philadelphia. When the parties met at the time stipulated defendants had not procured the extension, they tendered a deed and also ample security against

any possible damage by reason of the mistake, which plaintiff refused. Defendants then asked for an extension of the time of performance for a week or ten days to enable them to procure an extension of time of payment of the mortgage; this also, plaintiff refused. Eight days after the meeting such an extension was procured and tendered by defendants to plaintiff, with expenses of recording and the deed. Plaintiff refused to accept; he had on the same day, prior to the tender, commenced this action to recover back the payment made by him on execution of the contract and expenses. The testimony was conflicting, as to whether defendants during the three days between the time of notice of the mistake and that for performance, made any efforts to procure the extension. Plaintiff's evidence was to the effect that when so notified, defendants said they would not apply for an extension. The evidence showed and the court found that plaintiff, at the time of executing the contract, made special inquiries as to the time when the mortgage would mature, and relied upon the representation in the contract; also, that five days after the time fixed for performance he purchased other premises. *Held*, that plaintiff was not required to accept the security offered in lieu of performance; that the question as to whether the three days was a sufficient or reasonable time in which to obtain the extension, and as to whether defendants had used due diligence to procure it in that time were questions of fact; and that the evidence justified a finding that defendants were not entitled to relief from their default. *Id.*

5. To constitute a cause of action for fraudulent representations on the part of the vendor on sale of property, it is necessary to show not only a false statement or representation as to the property, but that such representations were made with intent to deceive, and that the accomplishment of this intent was the result of the vendee's reliance upon the representations. *McIntyre v. Buell.* 193

6. Plaintiff, who owned what was termed "a locator's mining claim" in government lands, contracted to convey the same to a company to be formed to develop the "lode," defendants, as part of the consideration, agreeing to pay a sum named. The claim was conveyed as agreed. In an action to recover a portion unpaid of the purchase-money, defendants set up as a counter-claim that plaintiff, to induce them to enter into the agreement, falsely and fraudulently represented that he was seized of the whole lode, when he had, in fact, previously conveyed his right to one-third of the surface ground of the lode to a niece, whereby they sustained damage. Plaintiff denied making any false representations, and testified that he informed defendants that he had given to his niece one-third of the surface. A deed to the niece was given in evidence. The court charged that it conveyed the right to the surface only, and did not impair plaintiff's right to the materials beneath. To this defendants excepted. The jury found for plaintiff on the issue of fraud. *Held*, that whether the deed conveyed one-third of the whole claim or a right only to one-third of the surface, if plaintiff represented that he owned the whole, the falsity of the representation was established; but that the jury having found with plaintiff on this issue, the construction of the deed was immaterial, so far as the counter-claim was concerned, and so, if erroneous, was not ground for reversal; that had the jury been instructed that the deed conveyed one-third of the mine instead of one-third of the surface only, this, conceding it to be correct, would not alone have warranted a finding of fraud, as while it would show a mistake on the part of plaintiff as to the construction, it would not establish any fraudulent intent. *Id.*

7. Where the owner of two parcels of land imposes a burden upon one for the benefit of the other, and then conveys the former by absolute and unqualified deed, no easement in favor of the land retained against the parcel conveyed will be implied, unless at the time of

the conveyance the burden was apparent, and is strictly necessary for the enjoyment of the parcel retained. *Wells v. Garbutt.* 430

See SALES.

WAIVER.

In the absence of any agreement, a waiver of forfeiture of a policy of life insurance results from negotiations or transactions with the insured, by which the insurer after knowledge of the forfeiture recognizes the continued existence of the policy, or does acts based thereon, or requires the insured by virtue thereof, to do some act or incur some expense or trouble. *Ronald v. M. R. F. L. Assn.* 378

— *When general agent of insurance company has power to waive condition in policy, although it provides that no agent has power to waive any conditions.*

See *Berry v. A. C. Ins. Co.* 49
Cross v. N. F. Ins. Co. 133

WAREHOUSING.

Defendant indorsed and delivered to plaintiffs a warehouse receipt for certain wet salted calf skins as security for a call loan. In an action to recover on the loan defendant sought to counter-claim damages resulting from a deterioration of the calf skins while in the warehouse, alleged to have been caused by plaintiffs' neglect to care for them. It appeared that plaintiffs gave no personal attention to the skins while in the warehouse and exercised no supervision over them; that defendant had free access to them and frequently went to the warehouse and examined them. The skins were all piled together and the injury was caused by the heating of those in the center of the pile; this did not appear upon the surface of the pile. When defendant discovered that the skins were injured he called plaintiffs' attention to it and advised that they be resalted and tanned; plaintiffs declined to do either; defendant also proposed to take them to his own warehouse and treat them.

Plaintiffs did not consent, but suggested that defendant pay the debt and take the skins. *Held*, that while the legal title to the property was vested in plaintiffs and the warehousemen were their bailees, defendant had at least an equal interest in the preservation of the property, the bailment being for the mutual benefit of the parties, and no duty devolved upon the former to cause it to be handled over and inspected; that plaintiffs were not required to permit defendant to take it to his own warehouse, and whether, under the circumstances, it was their duty to take some action for its preservation after being advised of its deterioration, for neglect to perform which they were liable, was properly submitted to the jury. *Willets v. Hatch*. 41

WATER COURSES.

1. The title of a riparian proprietor to his water rights in a stream, and his right to redress for their invasion, is not conditional upon a beneficial user of them. *N. Y. Rubber Co. v. Rothery*. 298
2. Where there is a diversion of the waters of the stream, which materially diminishes its natural flow over the lands of a proprietor below, he may maintain an action and is entitled to recover nominal damages, although he has as yet made no use of the waters, or water enough is left in the stream for the purposes of his business as then conducted. *Id.*
3. This right to recover nominal damages is substantial, as it confirms the proprietor's right to the beneficial use of the waters of the stream as it was accustomed to flow before the diversion, and if withheld might tend to impeach or destroy his title by adverse user. *Id.*
4. In an action to recover damages for such a diversion the court, after charging that if defendants diverted the waters of a stream, to a degree that materially and appreciably diminished its flow along the lands of plaintiff, the latter was entitled to nominal damages, charged in substance that the question must be determined by the use of the land as it was, and not with reference to the future; that the question was as to whether the water was diverted so as to leave the stream, to a material and appreciable extent, insufficient for the purposes of plaintiff's business, and refused to charge that plaintiff's right to maintain the action and to recover nominal damages did not depend at all upon his showing actual or perceptible damage. *Held*, error. *Id.*
5. In an action to restrain defendant from so obstructing the waters of a creek as to cause them to flow back upon plaintiff's land, it appeared that G. formerly owned plaintiff's lot and that of defendant below. Upon the lot now owned by defendant was a mill and a dam which had been maintained for many years, which dam, when the pond was full, set back the waters of the creek upon the lot now owned by plaintiff. G. executed a mortgage upon part of plaintiff's lot, covering that portion so overflowed, without reserving the right to flow any part of it. At that time the mill was in operation, but the water in the pond was low. G. thereafter conveyed both lots to defendant. The mortgage was foreclosed, and, pursuant to judgment of foreclosure, the mortgaged premises were sold and conveyed by referee's deed to plaintiff. There was no reservation in the judgment, or in the referee's deed, of any right to flow any part of the premises. Prior to the sale and conveyance, the dam was carried away, and it did not appear that at the time of the execution of the mortgage or the referee's deed, any portion of plaintiff's lot was overflowed, or that there was any visible sign of previous overflow. Defendant commenced rebuilding the dam, with intent to carry it up to its former height. It did not appear that, in order to operate defendant's mill with substantially undiminished efficiency, it was necessary to maintain the dam at full height, or at such a height as would cause the over-

flow of plaintiff's land. *Held*, that there was no implied reservation of the right to overflow; and that a permanent injunction was properly granted. *Wells v. Garbutt*. 490

WHARVES.

1. *It seems*, that a party having and assuming to maintain a dock and slip to supply wharfage for hire is bound to keep them in suitable condition for that purpose, and for any injury or loss resulting to a person properly using them, solely occasioned by a failure to perform this duty, he is liable. *Vroman v. Rogers*. 167
2. The duty, however, is imposed upon one hiring wharfage to exercise ordinary care and, if by such exercise, he could have discovered the defect causing the injury, he is guilty of contributory negligence. *Id.*
3. In an action to recover damages for an injury to plaintiffs' barge and its cargo while lying at defendant's dock, wharfage at which had been leased by plaintiffs, the testimony of the latter was to the effect that they made the lease upon the representation of defendant that the place at the wharf so let was safe and had six feet of water at low tide; that at the wharf it was less than six feet and the ground under the barge sloped down outward from the docks, so that at low tide the side of the barge near the dock rested on the bottom, and by reason of the slope broke away from its fastenings and turned over, thus causing the loss complained of. The barge had been at the dock for ten days prior to the injury, and at low tide had rested on the bottom. The court instructed the jury that if they found that the bottom of the slip was defective or in unsafe condition, and this caused the loss, the further question was for them to determine whether defendant was guilty of negligence and plaintiffs free from contributory negligence. Plaintiffs' counsel requested the court to charge "that defendant made the statement

that this place was all right, the plaintiffs had the right to rely on that statement." The court stated that the jury might consider that on the question of negligence, and declined to charge that the jury might rely on the statement or that it relieved them from making a personal examination. *Held*, no error; that while assuming the statement was made, plaintiffs were justified in assuming it to be true, and negligence could not be imputed to them in placing the barge there without personal examination, the inference was justified that when previously at low tide the barge rested on the bottom, it could have been easily ascertained whether the ground beneath it was suitable to rest upon, and the question of contributory negligence was properly submitted to the jury. *Id.*

WILLS.

1. The will of F., after legacies to the testator's children and a gift to his wife "forever" of the residuary personalty, also a provision that in case the personalty was insufficient to pay said legacies enough real estate should be sold for that purpose, contained this clause: "I also give, devise and bequeath to my wife Ellesheba all the rest and residue of my real estate, but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively, to be divided in equal shares between them." In an action for the specific performance of a contract for the purchase of land which formed part of the residuary real estate, title to which plaintiff claimed through the widow, *held*, that she took only a life estate; but that by necessary implication a beneficial power was conferred upon her to dispose of the residuary real estate, with a limitation over in case of her death without exercising the power; and that, therefore, she could convey a good title. *Leggett v. Firth*. 7
2. P. died leaving him surviving his widow, a daughter and five grandchildren, two of them children of the daughter, three the children of

deceased sons; he died seized of four parcels of real estate. By his will he directed his executors, if his widow consented, to sell said real estate, invest one-third of the proceeds and pay the income therefrom to his widow during her life in lieu of dower, and after her death divide the principal among his grandchildren then surviving; one-third he gave to his daughter, the other third to his daughters-in-law and their children. The testator directed his executors to dispose of his residuary estate or put it in shape to divide equally among his said grandchildren "whenever either shall become of age." The will then contained this clause: "It may so happen that my daughter * * * may live to have other children after my death, and after my executors may have divided my estate; in that case, it is my wish that they come in and share in the estate left my wife after her death in preference to the others, so that all my grandchildren may eventually receive the same amount." The widow refused to accept the provision made for her. In pursuance of a judgment in a suit for the partition and sale of the four parcels, three of them were sold, one-third of the proceeds being brought into court and the proceeds invested, the income to be paid to the widow during life as and for her dower interest. Thereafter, and during the life of the widow and before a division of the residuary estate, a child was born of the testator's daughter. *Held*, that the intent of the testator was to provide for every child born of his daughter after his death, and so that G., the child so born, was entitled to the benefit of the provision, although born before a division; also, that the refusal of the widow to accept the provision made for her did not operate to deprive the child so born of such benefit. *Hotaling v. Marsh*. 29

3. The law favors a construction of a will which will prevent partial intestacy. *Schutt v. Moll*. 122
4. The fact of making a will raises a strong presumption against any expectation on the part of the tes-

tator of leaving, or a desire to leave, any portion of his estate beyond the operation of his will. *Id*.

5. In an action to recover back moneys paid upon a contract to sell real estate, the following facts appeared: In 1876 one H. died seized of the premises in question. At that time he was living with one B. as his wife. R., to whom B. had been married, was then alive, but had obtained a divorce from her, the decree in which forbade her remarriage during his lifetime. B. had one daughter W., of whom R. was the father, and another daughter C., of whom H. was the father; the latter left no heirs at law. H. devised one-third of his real estate to his "adopted daughter" W., one-third to his "daughter" C., and one-third to his "wife" B., adding "that is to say, her dower right to my estate;" he conferred upon his "wife" B. with his executor, power to sell his real estate, and provided that the proceeds should be deposited by them in a savings bank until his "above-named children" arrived at the age of twenty-one, when they were to receive their interest of one-third of the money deposited therein. H. then devised to his "wife" the rents and interests of his estate during the minority of his "children." B. died intestate a few months after H. C. died within a year thereafter, aged two years, leaving no relatives on her mother's side except a grandmother and her half sister W. Subsequently, in a proceeding for the sale of infant's real estate, the interest of W. was sold to defendant. *Held*, that under the will, B. was vested with the fee of one-third of the real estate; that upon her death, C. and W. each became vested with an undivided one-half; that upon the death of C., her undivided one-half passed to W.; and so, that defendant had a good title. *Id*.
6. The will of S., who died in 1856, after giving to his wife the use and income of one-third of his house and lot and of his store and lot in the city of New York, authorized and directed his executors to lease

- and rent that portion not devised, to pay all taxes, expenses and charges, "and to divide the residue of the income thereof" among the testator's five children during life, and after death he devised "the same to their heirs in fee forever." In settlement of a suit brought by the widow for dower, the children agreed to keep the house and store in good repair and pay to her one-third of the gross income. The executors thereafter leased both premises, paying her the one-third so agreed upon. In an action brought by a son of one of said children upon the death of his father for partition, the trial court ordered a sale and partition, and that the widow refund one-third of the taxes, repairs, etc., paid for six years prior to the commencement of the action. *Held*, error; that the testator's intention was to give the executors power to rent the whole premises, paying to the widow one-third of the income, and out of the remainder to pay all expenses; also that while the grandchildren as remaindermen might not be bound by the contract of the parents as life tenants, the construction given by them to the will and acted upon for many years would not be overturned when the provisions were reasonably capable of that construction. *Starr v. Starr*. 154
7. To cut off the right of an heir to inherit there must be a legal devise; mere words of disinheritance are insufficient to effect that purpose. *Gallagher v. Crooks*. 338
8. Where, therefore, a testator fails to make a legal devise of his realty, or having legally devised it, the devise fails for any cause, the heir will inherit notwithstanding there is an express provision in the will that he shall not take any part of the estate. *Id.*
9. *It seems*, the word "relations," when used in a will relating to personality, only embraces persons within the Statute of Distribution. *Id.*
10. As to whether the word when used in a devise is limited to persons within the Statute of Distribution, or to those within the Statute of Descent, *quære*. *Id.*
11. In an action of ejectment the following facts appeared: The premises in question belonged to one G., who died leaving a will, by which he devised and bequeathed his property to his widow for life, subject to an annuity to his brother J.; after her death he provided for the payment of certain bequests and directed that the remainder, if any, be equally divided between the children of J. G. and all the testator's relations by his father's side in the United States at the date of his will, subject to the payment of said annuity to J. The will then provided as follows: "He (J.) is to have nothing from my property, and I hereby cut off from inheriting any thing or property of mine his wife, or any person in any way related to her, either by blood or marriage, with the exception of himself, and he only in the way I have stated above." After the death of the testator's widow this action was brought by the widow, the children and grandchildren of J. Plaintiffs gave evidence tending to show that J. G. died unmarried and without children, and that the testator had no relatives living in the United States at the date of his will or death who were descended from his grandfather or father, other than plaintiffs. *Held*, that while the burden was upon plaintiffs of showing that there were no persons living who could take as remaindermen, it was sufficient to make out a *prima facie* case, and as their evidence showed the existence of any such person to be improbable, it was sufficient for that purpose, and that, therefore, a nonsuit was error. *Id.*
12. V. died seized of certain premises, leaving his widow and three children, all of age, surviving him. By his will he gave to his widow all of his estate during life, or until she should remarry. Should she remarry, the executors were directed to sell all of the estate, pay one-third of the proceeds to her and divide the residue equally among the children, the

children of any child who may have died to receive the parent's share. Upon the death of the wife without having remarried, the property was directed to be divided equally among the testator's children, the children of a deceased child to receive their parent's share. Full power was given to the executors to sell and convey the real estate "whenever they may deem it best to do so, and upon such terms as they may think desirable." The widow and children united in a conveyance of the premises to defendant, who contracted to sell the same to plaintiff. Defendant tendered a deed, executed by himself, which plaintiff refused to accept. In an action for specific performance, or, in case it could not be had, to recover back the purchase-money paid, defendant produced a deed, executed by the executors, which recited that the consideration stated was the same as that stated in the deed of the widow and children. It was not claimed that any portion of the consideration was paid to the executors as such. *Held*, that the first deed simply conveyed a title, subject to be defeated in part by the death of one of the children prior to the death or remarriage of the widow; that nothing remained for the executors to convey but the future contingent interests of the grandchildren, and this, under the power of sale, they could only so sell and convey as to secure the

proceeds to the grandchildren in case of the contingency happening making them the ultimate devisees; that the deed executed by them was not a valid execution of the power; and, therefore, that defendant did not have a marketable title. *Harris v. Strodl*. 392

18. The will of K., after providing for the payment of debts, etc., directed that his residuary estate should be divided equally between his wife and children. The executors were directed to divide such residue into as many equal shares as would give two to each beneficiary, to convey one to the beneficiary and retain the other, paying to him or her the income during life; they were also authorized to sell any or all the real or personal estate, and after payment of debts as provided, to invest the proceeds "as they, in their discretion, may deem most for the interest of the parties interested." *Held*, that the will created an express trust (1 R. S. 728, § 55), and the trustees took title to the lands embraced therein and set apart for its purposes; that L. & G. succeeded to this title; that the power of sale was intended to be applicable to the subject of the trust, and, being thus annexed to it in aid of its execution, was taken by the substituted trustees; and that, therefore, they could convey a good title. *Lahey v. Kortright* 450

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